No. 83-1444

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCDERMOTT INCORPORATED, MCDERMOTT INTERNATIONAL, INC., BROWN & ROOT, INC., and HALLIBURTON COMPANY,
Petitioners,

—against—

EXXON CORPORATION, ET AL.,
Respondents.

IN RE MCDERMOTT INCORPORATED, MCDERMOTT INTERNATIONAL, INC., BROWN & ROOT, INC., and HALLIBURTON COMPANY,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, A COMMON LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents:

American Independent Oil Company; American Natural Gas Production Company; American Petrofina Company of Texas; American Petrofina Exploration Company; Aminoil Development Inc.; Aminoil International Inc.; Aminoil U.S.A., Inc.; Amoco Egypt Oil Company; Amoco (U.K.) Exploration Company; Amoco Iran Oil Company; Amoco Norway Oil Company; Amoco Production Company; Amoco Trinidad Oil Company; Arabian American Oil Company; Aramco Overseas Company; Aramco Services Company; Arco British Limited; Arco Exploration, Inc.; Arco Oil Producing, Inc.; Atlantic Richfield Company; Atlantic Richfield Indonesia, Inc.; BP Alaska, Inc.; The British Petroleum Company Ltd.; BP Petroleum Development Ltd.; BP Trading Ltd.; Cabinda Gulf Oil Company; Carribean Gulf Refining Corporation; Clark Oil Producing Company; Conoco Inc.; The Dow Chemical Company; Dow Chemical International, Ltd.; Drillamex, Inc.; El Paso Natural Gas Company; Esso Exploration & Production Australia, Inc.; Esso Production Malaysia, Inc.; Exxon Corporation; Exxon Pipeline Company; Farmland Industries, Inc.; Finadel, Inc.; Gas Producing Enterprises, Inc.; Herbert I. Goodman (trustee for Gulf Asian Terminals Inc.); Gulf Kuwait Company; Gulf (U.K.) Offshore Investments Ltd.; Gulf Oil Company (Nigeria) Ltd.; Gulf Oil Company of Gabon; Gulf Oil Corporation; Gulf Oil Terminals (Ireland) Ltd.; Gulf of Suez Petroleum Company; Gulf Refining Company; Mene Grande Oil Company; Mineracao e Quimica do Nordeste, S.A.; Mobil Eugene Island Pipeline Company; Mobil G-C Corporation; Mobil Oil Exploration & Producing Southwest, Inc.; Mobil Oil Corporation; Norsk Hydro a.s.; Norsk Hydro Produksjon a.s.; The Northwestern Mutual Life Insurance Company; The Offshore Company; Pecten Cameroon; Pecten Malaysia Company; Petroleos Mexicanos; Phillips Petroleum Company; Phillips Petroleum Company, Norway; Shell Explorer Ltd.; Shell Oil Company; Shell Pipe Line Corporation; Signal Oil of Louisiana, Inc.; Sonat Exploration Company; Taranaki Offshore Petroleum Company, Ltd.; Terra Resources, Inc.; Valero Energy Corporation; Wintershall Oil & Gas Company; Zaire Gulf Oil Company.

Questions Presented

1. Is the assertion of the Fifth Amendment privilege by a non-party witness in a civil case admissible as "evidence" of the "facts" asserted in the unanswered question?

2. Where, in an effort to avoid a retrial of perhaps the largest and most complex private antitrust litigation in history, the district court certified its ruling on the admissibility of Fifth Amendment invocations for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), did the court of appeals abuse its discretion in denying leave to appeal because the district court did not formally recite the text of section 1292(b) in its order granting certification, while at the same time indicating that the district court should not issue a new certificate complying with this requirement?

Parties Below

The parties to this action in the Court below were:

Defendants-Petitioners:

Brown & Root, Inc., McDermott Incorporated, McDermott International, Inc., and Halliburton Company.

Plaintiffs-Respondents:

American Independent Oil Company; American Petrofina Company of Texas; American Petrofina Exploration Company; Aminoil Development Inc.; Aminoil International Inc.; Aminoil U.S.A., Inc.; Amoco Egypt Oil Company; Amoco (U.K.) Exploration Company; Amoco Iran Oil Company; Amoco Norway Oil Company; Amoco Production Company; Amoco Trinidad Oil Company; Arabian American Oil Company; Aramco Overseas Company; Aramco Services Company; Arco British Limited; Arco Exploration, Inc.; Arco Oil Producing, Inc.; Atlantic Richfield Company; Atlantic Richfield Indonesia, Inc.; BP Alaska, Inc.; The British Petroleum Company Ltd.; BP Petroleum Development Ltd.; BP Trading Ltd.; Cabinda Gulf Oil Company; Carribean Gulf Refining Corporation; Clark Oil Producing Company; Conoco Inc.; The Dow Chemical Company; Dow Chemical International, Ltd.; Drillamex, Inc.; Esso Exploration & Production Australia, Inc.; Esso Production Malaysia, Inc.; Exxon Corporation; Exxon Pipeline Company; Farmland Industries, Inc.; Finadel, Inc.; Florida Exploration Company (successor in interest to Florida Gas Exploration Company); Freeport Minerals Company (acting by and through its division Freeport Sulphur Company); Freeport Oil Company; Gas Producing Enterprises, Inc.; Herbert I. Goodman (trustee for Gulf Asian Terminals Inc.); Gulf Kuwait Company; Gulf (U.K.) Offshore Investments Ltd.; Gulf Oil Company (Nigeria) Ltd.; Gulf Oil Company of Gabon; Gulf Oil Corporation; Gulf Oil Terminals (Ireland) Ltd.; Gulf of Suez Petroleum Company; Gulf Refining Company; Home Petroleum Corporation; Koch Industries,

Inc.; Mene Grande Oil Company; Mineracao e Quimica do Nordeste, S.A.; Mobil Eugene Island Pipeline Company; Mobil G-C Corporation; Mobil Oil Exploration & Producing Southwest, Inc.; Mobil Oil Corporation; Norsk Hydro a.s.; Norsk Hydro Produksjon a.s.; The Northwestern Mutual Life Insurance Company; Pecten Cameroon; Pecten Malaysia Company; Petroleos Mexicanos; Phillips Petroleum Company; Phillips Petroleum Company, Norway; Sante Fe Energy Company; Santa Fe Industries, Inc.; Santa Fe Natural Resources, Inc.; Shell Explorer Ltd.; Shell Oil Company; Shell Pipe Line Corporation; Signal Oil of Louisiana, Inc.; Taranaki Offshore Petroleum Company, Ltd.; Terra Resources, Inc.; Valero Energy Corporation; Winterhall Oil & Gas Company; Zaire Gulf Oil Company.

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PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, A COMMON LAW WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinions Below

The order and decision of the court of appeals are unreported and are set forth in the appendix at 1A, 2A. The orders and rulings of the district court and the magistrate are unreported and are set forth in the appendix at 8A-11A.

Jurisdiction

The order of the Court of Appeals for the Fifth Circuit denying leave to appeal pursuant to 28 U.S.C. § 1292(b) (1982) was entered on Janury 26, 1984. As demonstrated below, this Court has jurisdiction under 28 U.S.C. § 1254(1) (1982) or, in the alternative, 28 U.S.C. § 1651(a) (1982).

Constitutional and Statutory Provisions and Rules

Those portions of the Constitution, statutes, and rules of evidence involved herein (specifically the Fifth Amendment to the United States Constitution, sections 1292(b) and 1651(a) of title 28, and Proposed Rule of Evidence 513) are set forth in the appendix at 1S-2S.

Statement of the Case

The Litigation

These are 25 antitrust cases brought by some 75 corporate plaintiffs in various district courts and consolidated by the Judicial Panel on Multidistrict Litigation in the Eastern District of Louisiana for coordinated pre-trial proceedings. Individually and together they are among the largest and most complex private antitrust cases ever to have burdened the American judicial system. The industry in question is marine construction—the design, engineering, fabrication, and installation of offshore drilling and production platforms and pipelines used to recover and transport to land oil and gas located under the sea. Plaintiffs include the largest oil companies in the world.

The size and scope of the claims asserted are staggering. Plaintiffs allege that the prices for over 4,000 custom-built marine construction projects, done for them over a 25-year period throughout the world, were artificially inflated by defendants' alleged conspiracy to rig bids and otherwise re-

strain trade.[1] Some of the marine construction jobs in question bear individual price tags in the hundreds of millions of dollars. The total damages claimed are unspecified but could run into the billions of dollars.

Liability discovery is substantially complete,[2] and trial is scheduled to begin on February 4, 1985. Tens of millions of pages of documents have been produced and approximately 500 witnesses have been deposed on the liability issues alone. Substantial additional document production and many more depositions are anticipated on the damages issues. The district court has not yet determined whether all these cases will be tried together (as plaintiffs have requested), or whether there will be separate trials, either by geographic areas or by selecting a "bellwether" case to go first. Even the most expeditious of these alternatives will entail a complex trial which defendants estimate will take well in excess of six months to complete.

The Claims of Privilege and Plaintiffs' Proposed Use of Them

From the outset of the litigation it has been clear that a number of present and former employees of defendants—each of whom is acting on the advice of his own independent counsel—would assert their Fifth Amendment privilege not to

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1 Plaintiffs' principal allegations are that the defendants conspired to restrain trade and attempted to monopolize the marine construction industry in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982). Jurisdiction was predicated on sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, and on 28 U.S.C. §§ 1331 and 1337(a) (1982). The various complaints also include additional claims for purported violations of state statutory and common law arising out of the same general conduct asserted in the antitrust claims.

2 Most of these cases were commenced in 1979 following the return of an indictment in *United States* v. *J. Ray McDermott & Co., Inc., et al.*, 78 Crim. 422 (E.D. La. Dec. 14, 1978), and the acceptance of pleas of *nolo contendere*. The rest were commenced thereafter. After consolidation for pretrial purposes, *In re Marine Construction Antitrust Litigation*, 487 F. Supp. 1355 (J.P.M.D.L. 1980) (*per curiam*), coordinated discovery began in 1980.

testify about some or all aspects of the case. It has become equally clear that the plaintiffs plan to rely on these assertions as "evidence" at trial.

On twelve separate occasions plaintiffs' counsel were informed that a prospective deponent would, because of Fifth Amendment concerns, answer no questions at all at his deposition. Yet hour after hour, day after day, these witnesses were asked "wifebeating" questions which plaintiffs' counsel knew in advance would not be answered—questions such as "Mr. Rice, did you ever instruct any of your subordinates to stop colluding with McDermott?" Deposition of W. Rice, 1/21/83 at 73-74.[3] And when, to examining counsel's surprise, one witness changed his mind and offered to answer a question as to which he had previously asserted his privilege, counsel declined to put the question again, preferring the Fifth Amendment "answer", *see* Deposition of I. Foster, 3/15/83 at 100.

Plaintiffs have videotaped the depositions of those witnesses who invoked the Fifth Amendment (many of whom will be unavailable and beyond the court's jurisdiction at the time of trial) far more frequently than the depositions of witnesses not expected to invoke the privilege. Their obvious purpose is to present the assertions of privilege to the jury in the most vivid and prejudicial form. Indeed, in describing the case he expects to present at trial, plaintiffs' lead counsel has candidly admitted to the court that "the Fifth Amendment is obviously critically important to our plan." Transcript of 10/5/83 hearing before Judge Sear at 119 (hereinafter cited "Tr.").

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3 The following exchange is one of many other examples:

"Q. Mr. Gard, would you tell me whether any project that Brown & Root constructed for Tennessee Gas Pipeline Company during the period January 1, 1955, through at least December 31, 1975, was not subject to some collusion between Brown & Root and McDermott?"

Mr. Leonard: "Privilege."

"A. I assert my privilege under the 5th and 14th amendments."

(Deposition of W. Gard, 5/4/82 at 208)

The Proceedings Below

The district court, aware to a certainty that the Fifth Amendment issue would arise at trial and that an erroneous ruling on the law would necessitate reversal and a retrial, suggested that the issue be resolved by pretrial motion. The defendants accordingly moved, *in limine*, to preclude plaintiffs from introducing any such "testimony" and to preclude references before the jury to assertions of the privilege. After extensive briefing, the magistrate ruled on August 1, 1983, that Fifth Amendment assertions of non-party witnesses were inadmissible, stating:

> "[T]he invocation of the Fifth Amendment privilege by a present or former employee of a defendant is a right personal to the witness, and is or should be exercised without interference by the employer-defendant. Thus, the traditional rationale of respondeat superior, the ability of the employer to control the actions of the employee, evaporates in the context of a Fifth Amendment assertion by the employee. Furthermore, the assertion of the Fifth Amendment by non-party witnesses in this jury case will unfairly prejudice defendants with evidence that is of slight probative value." (10A).

Plaintiffs then appealed to the district court (Morey L. Sear, J.), who filed a minute entry on October 21, 1983 granting the motion for review and reversing the magistrate's ruling denying evidentiary use of assertions of the privilege. Judge Sear wrote:

> "The use of such evidence will be permitted upon a showing that the evidence is relevant and its probative value substantially outweighs the danger of unfair prejudice, confusion of the issues and is not misleading to the jury." (9A).

Defendants moved for reconsideration or, in the alternative, certification pursuant to 28 U.S.C. § 1292(b). The district court granted certification in a minute entry entered November

22, 1983 in which he identified the controlling issue of law as "the issue of evidentiary use at trial of Fifth Amendment assertions by non-parties" (8A). The district court cited, but did not recite the language of, section 1292(b) in granting the motion for certification. Defendants filed a petition for leave to take an interlocutory appeal within ten days of the entry of the order certifying the question to the court of appeals.

On January 26, 1984 the Court of Appeals for the Fifth Circuit denied defendants leave to appeal "for want of proper certification by the district court under § 1292(b)" based upon the district court's failure to recite the statutory prerequisites (2A, 4A). The court of appeals went on to conclude that the order was not an appropriate subject of an interlocutory appeal in any event because it did not properly present a controlling question of law.

Following the language of the district court's certification, defendants had framed the controlling question of law as "whether there may be evidentiary use at a jury trial of a non-party witness's invocation of the Fifth Amendment with the consequence that examining counsel can virtually manufacture evidence by asking questions before the jury to which he knows the witness will respond by invoking the Fifth Amendment." Petition for Permission to Take an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) at 3. Yet the court of appeals held that this case presented no "clear-cut question of law against a background of determined and immutable facts" (6A) on the ground that:

> "A single answer could suffice only if the answer were either that an assertion of the fifth amendment by a non-party is never admissible in evidence under any circumstances, or that it is always admissible. If such evidence is admissible only under certain conditions, admissibility could not be determined without considering each set of conditions on its specific facts." *Id.*

But it is precisely defendants' position, as set forth in our petition to the court of appeals, that these Fifth Amendment

assertions by non-parties are not admissible in evidence "under any circumstances". We submit that the court of appeals erred in either refusing to recognize that clear-cut question of law or, worse yet, recognizing and resolving it *sub silentio* by concluding that admissibility depends on an assessment of the degree of the witness's "loyalty" to a party—all on a petition for leave to appeal without the benefit of briefing and argument.[4]

Reasons for Granting the Writ

I. The Lower Courts Have Mistakenly Interpreted *Baxter* v. *Palmigiano* to Permit an Inference of Guilt, and of Specific Facts, from the Invocation of the Fifth Amendment by Non-Parties.

In *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), this Court permitted an adverse inference to be drawn from a party's silence in a civil, non-jury proceeding. *Baxter* has been relied upon by the Second,[5] and now the Fifth, Circuits as authority for the proposition that, in a jury trial, a non-party witness may be asked questions which counsel knows in advance the witness will "answer" by invoking his Fifth Amendment privilege—and that the jury may infer from this occurrence that the "facts" contained in counsel's question are true.[6] In doing so,

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4 The court of appeals recognized that the invocations of the privilege were "on the advice of [the witnesses'] own independent counsel" (3A). The magistrate and the district court had rejected, on the basis of defendants' factual showing, plaintiffs' contention that the invocations of the privilege had been influenced by defendants. Despite this, the court below indicated that the question of admissibility could not be decided absent a "factual showing" as to whether the witness was "disinterested" or had "continuing loyalty to the employer" (6A).

5 *Brink's Inc.* v. *City of New York*, 717 F.2d 700 (2d Cir. 1983). We are advised that the case has been finally concluded and no further proceedings are contemplated.

6 This view is by no means unanimous. *See* Judge Winter's well-reasoned dissent in *Brink's Inc.* v. *City of New York*, 717 F.2d 700, 714 (2d Cir. 1983), and the opinion of Judge Stern, captioned "dissenting" but actually concurring, in *Lionti* v. *Lloyd's Insurance Co.*, 709 F.2d

these courts have violated logic, misapplied *Baxter*, and ignored or overlooked this Court's holding last Term in *Pillsbury Co.* v. *Conboy*, ___ U.S. ___, 103 S. Ct. 608 (1983).

Baxter held simply that the evidentiary rule permitting the trier of fact to draw an adverse inference from a party's silence is applicable in a civil proceeding even though that silence was based on an invocation of the Fifth Amendment. There is nothing in *Baxter*—which speaks only of a "*party's silence*"—to support the proposition that a non-party may be brought before a jury, or his videotaped or transcribed deposition presented, for the express purpose of having that jury hear him invoke the Fifth Amendment and infer from that invocation the truth of the premises of the unanswered questions.

This procedure for smuggling contraband into the jury room is impermissibly prejudicial both because it is based on the logical fallacy that guilt may be inferred from Fifth Amendment silence (*see* pp. 10-11 below) and because it is impossible to cross-examine a witness who takes the Fifth. The latter obstacle to admissibility was examined in this Court's decision last Term in *Conboy*. There, an executive of one of the defendants in the *Corrugated Container Antitrust Litigation* had been granted immunity and had testified at length about price-fixing in a prior grand jury investigation. In the subsequent civil antitrust suits, the plaintiff-purchasers obtained the transcript of this grand jury testimony and read it to the

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237, 244 (3d Cir. 1983); *Depew* v. *Hanover Insur. Co.*, 73 F.R.D. 101, 103 (E.D. Tenn. 1976); *Paynes* v. *Lee*, 362 F. Supp. 797, 800 (M.D. La. 1973), *aff'd per curiam*, 487 F.2d 1307 (5th Cir. 1974); *Frierson* v. *McIntyre*, 151 F. Supp. 5, 6-7 (W.D. Va. 1953). *See also* Morrison, *Commentary: Availability of Fifth Amendment Privilege Against Self-Incrimination and the Permissibility of Drawing Adverse Inferences: Alternative Perspectives*, 48 A.B.A. Antitrust L.J. 1421 (1979); Moxham, *A Comment Upon the Effect of Exercise of One's Fifth Amendment Privilege in Civil Litigation*, 12 New Eng. L. Rev. 265 (1976); Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 Va. L. Rev. 322 (1966).

witness at his deposition, asking him whether he had "so testified". When he refused to answer, invoking the Fifth Amendment, the district court held him in contempt. The Seventh Circuit reversed.[7] This Court granted *certiorari* and affirmed the Seventh Circuit because the deposition testimony would have had to go beyond the immunized testimony and be subject to cross-examination barred by the Fifth Amendment in order to be admissible.

The Court pointed out that the grand jury transcripts themselves were inadmissible because the defendants had had no opportunity to cross-examine, 103 S. Ct. at 615 n.17, and that the same principle would apply to deposition testimony which simply affirmed that the prior testimony had been given, *id.* at 615 n.18. Accordingly, it held that the proposed deposition testimony would be inadmissible if defendants' right of cross-examination were curtailed by Fifth Amendment claims:

> "[E]ven if the direct examination is limited to the questions and answers in the immunized transcript, there remains the right of cross examination, a right traditionally relied upon expansively to test credibility as well as to seek the truth. Petitioners [the antitrust plaintiffs] recognize this problem, but maintain that the antitrust defendants 'would be entitled to test the accuracy and truthfulness of Conboy's repeated immunized testimony without going beyond the confines of that testimony.' Regardless of any limitations that may be imposed on its scope, however, cross examination is intended to and often will produce information not elicited on direct. We must assume that, to produce admissible evidence, the scope of cross examination at the deposition cannot easily

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7 A panel of the Seventh Circuit initially affirmed the district court's order. *In re Corrugated Container Antitrust Litigation, Appeal of John Conboy*, 655 F.2d 748 (7th Cir. 1981). On rehearing en banc, however, the full court vacated the panel decision and reversed the district court. 661 F.2d 1145 (7th Cir. 1981).

be limited to the immunized testimony." 103 S. Ct. at 615-16 (footnotes omitted).[8]

Allowing counsel to posit facts in a question to a non-party witness and allowing the jury to infer the truth of those assertions from the witness's invocation of the privilege permits the same evil which this Court condemned in *Conboy*, but in a more extreme form. Here, even though the question may have no basis in fact, the party against whom the Fifth Amendment "evidence" is offered is wholly deprived of cross-examination of that witness.

An even more fundamental difficulty with permitting evidentiary use of a witness's Fifth Amendment invocations (as distinguished from a party's silence) is that the invocation is simply not probative. Any view that it is probative rests on the assumption that it is logically valid to infer a witness's guilt from his invocation of the privilege. That is a popular fallacy, but a fallacy nonetheless. This Court has long recognized that one may properly choose to assert the privilege even though he has committed no crime. "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Slochower* v. *Board of Education*, 350 U.S. 551, 557-58 (1956).[9] Since answering even an innocuous question may result in a waiver, when in doubt "prudent counsel" will advise the witness to assert his Fifth Amendment privilege. *Conboy*, 103 S. Ct. at 633 n.18 (Stevens, J., dissenting). Only

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8 Similarly, in his concurring opinion, Justice Marshall described it as "questionable whether the deposition testimony would be admissible at trial, in light of the limits that might have to be placed on cross-examination by the other civil litigants." 103 S. Ct. at 621 n.5. Dissenting, Justices Stevens and O'Connor also recognized that restrictions on the right of cross-examination might result in the deposition testimony being inadmissible. 103 S. Ct. at 633 n.17.

9 Professor Slochower was branded a "Fifth Amendment Commie" and summarily dismissed from the faculty of a state university when he invoked his privilege before the Internal Security Subcommittee of the Senate Judiciary Committee, popularly known as the McCarthy Committee.

the individual who claims the privilege, and his attorney, will normally know his reasons for doing so; others, including the witness's employer, will generally have no access to the individual's thought process—nor should they have.[10]

If the trial court's decision here is permitted to stand, employers faced with enormous liability based on their employees' Fifth Amendment invocations might well be tempted to extract a waiver of the privilege under pain of discharge or other sanction, a tactic long since rejected by this Court. *See Gardner* v. *Broderick*, 392 U.S. 273, 279 (1968) ("[T]he mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of loss of employment.").[11] Recognizing and respecting the individuals' rights, neither the petitioners here nor their attorneys have ever attempted to influence any deponent in these cases either to waive or to assert the privilege; on the contrary, as the court below recognized (3A), each witness who wished legal advice with respect to the privilege, and each witness who has claimed it, has been represented by, and acted upon the advice of, independent counsel of his own choosing.

In 1972 this Court adopted (by vote of eight to one) proposed Rule of Evidence 513. *See* 56 F.R.D. 183, 260 (1972). Congress declined to adopt the rule, but not on the basis of any substantive disagreement.[12] The proposed rule requires

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10 Courts have rejected *in camera* judicial review of a detailed factual basis for an individual's claim of privilege. *See United States* v. *Wilcox*, 450 F.2d 1131 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972); *see also Hoffman* v. *United States*, 341 U.S. 479 (1951); *United States* v. *Nunez*, 668 F.2d 1116, 1121 (10th Cir. 1981).

11 *Cf. Regan* v. *New York*, 349 U.S. 58, 68 (1955) (Black, J., dissenting) ("Surely private employers are not now free to compel their employees to waive this and other constitutional privileges.").

12 Congress rejected all the proposed rules on privilege, largely because of the view that they might impinge on state-created rights and thus might be beyond the scope of the power granted by the Rules Enabling Act, 28 U.S.C. § 2072. Congress expressed no substantive disagreement with Proposed Rule 513, however. *See generally*, 2 J. Weinstein &

that knowledge of the claim of privilege be kept from the jury whenever possible; it prohibits comment by counsel upon a claim of privilege, and it entitles a party against whom the jury might draw an adverse inference to a curative instruction. The rule, in short, forbids precisely what plaintiffs seek to accomplish here.[13]

In a vigorous dissent in *Brink's Inc.* v. *City of New York*, 717 F.2d 700, 715-17 (2d Cir. 1983), Judge Winter, a former professor of evidence, surveyed the authorities on this issue, including Proposed Rule 513, and concluded that the exposure of a jury to a witness's assertion of the Fifth Amendment privilege in response to questioning calculated to elicit that response is "utterly without precedent in American law" and "an invitation to sharp practice". He reasoned that the breadth of the privilege, which extends to any answer "which would furnish a link in the chain of evidence needed to prosecute the claimant", *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951), renders its invocation inherently ambiguous so that its probative value "is derived entirely from the questions put by

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M. Berger, *Weinstein's Evidence* ¶ 501[01] at 501-12 (1982). The standards are viewed as a "convenient comprehensive guide to the federal law of privileges". *United States* v. *Mackey*, 405 F. Supp. 854, 858 (E.D.N.Y. 1975). Proposed Rule 513 has been enacted into law in substantially identical form in nine states. Ark. Unif. R. Evid. 512; Del. Unif. R. Evid. 512; Mont. R. Evid. 505; Neb. Rev. Stat. § 27-513 (1979); Nev. Rev. Stat. § 49.405 (1979); N.M. R. Evid. 513; N.D. R. Evid. 512; Okla. Stat. Ann. tit. 12, § 2513 (West 1980); Vt. R. Evid. 512. *See also* ABA Standards, The Defense Function § 7.6(c).

13 The complete text of proposed Rule of Evidence 513 is set forth *infra* at 2S. The same basic approach is reflected in the following comment:

> "It is submitted that the best solution is to recognize only privileges which are soundly based in policy and to accord those privileges the fullest protection. Thus, comment, whether by judge or counsel, or its equivalent of requiring the claim to be made in the presence of the jury, and the drawing of inferences from the claim, all would be foreclosed." C. McCormick, *Handbook of the Law of Evidence* § 76 at 156 (2d ed. 1972) (footnote omitted).

counsel", which are not subject to cross-examination. *Brink's*, 717 F.2d at 715.

Similar views were expressed by Judge Stern in his opinion (captioned dissenting but actually concurring) in *Lionti* v. *Lloyd's Insurance Co.*, 709 F.2d 237, 244 (3d Cir. 1983). Judge Stern added that an exception, attributing evidential value to a *party's* refusal to testify in civil proceedings, might be justified as a "transaction cost of litigation whose potential harshness is mitigated by the ability of a party, through counsel, to explain and control the contours of his invocation." *Id.* at 246. No such exception is justified, he stated, when a witness invokes the privilege on his own (as is the case here).

We respectfully submit that the clear teaching of this Court on the meaning of the Fifth Amendment privilege has been forgotten and needs to be reiterated:

> "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of Rights as a condition to acceptance of the Constitution by the ratifying States." *Ullmann* v. *United States*, 350 U.S. 422, 426-27 (1956) (footnotes omitted).

II. It is Imperative That the District Court's Ruling be Reviewed Now to Prevent the Massive Waste of Resources, and the Negative Reflection on the Judicial Process, That a Retrial Would Entail.

These actions constitute what is quite probably the largest and most complex private antitrust litigation in history. Just one of these cases will take many months to try, and the district court is considering (at plaintiffs' request) a consolidated trial of all twenty-five. If the district court erred in its ruling on the motion *in limine*, no verdict for plaintiffs could possibly survive and a retrial would clearly be required. It was to avert such a massive waste of resources—of the courts, the jurors, the parties and the witnesses—that the district court conscien-

tiously sought guidance by certifying its Fifth Amendment decision pursuant to 28 U.S.C. § 1292(b). For that reason, the court of appeals should have accepted the appeal and provided the guidance sought. For the same reason, as well as because of the basic importance and recurring nature of the substantive issue involved, this Court should grant the writ and decide the question on its merits.

As the district court apparently recognized, this was the paradigmatic case for an interlocutory appeal under section 1292(b). There will be a trial, or trials, in these actions of monumental proportions. Retrial, or retrials, should be avoided by all possible means; the whole purpose of the Interlocutory Appeals Act was to eliminate such judicial waste. As Judge Becker noted in the *Japanese Electronic Products Antitrust Litigation* (M.D.L. 189), "the certification procedure of 28 U.S.C. § 1292(b) was intended specifically to expedite the disposition of 'big' cases like M.D.L. 189", *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F. Supp. 1190, 1243-45 (E.D. Pa. 1980), *aff'd in part and rev'd in part on other grounds,* No. 81-2333 (3rd Cir. Dec. 5, 1983).[14]

The court of appeals here paid lip service to the utility of interlocutory appeals even as it subverted section 1292(b) by resort to empty formalities. Although noting "the value that across-the-board [evidentiary] determinations may have in preparing complex consolidated cases for eventual trial", and stating that it "would interpret § 1292(b) liberally to attempt to accomplish better preparation of such cases for trial" (7A), it

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14 It is well settled, in the Fifth Circuit and elsewhere, that an issue need not be dispositive to merit certification under section 1292(b). *See, e.g., Garner* v. *Wolfinbarger,* 430 F.2d 1093, 1097 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971) (Review is available if the issue is important and "would affect the scope of the evidence in a complex case, even short of requiring complete dismissal."); *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir.) (en banc), *cert. denied,* 419 U.S. 885 (1974) ("A controlling question of law must encompass at *the very least* every order which, if erroneous, would be reversible error on final appeal.") (emphasis added).

denied leave to appeal because the district court had not recited the text of section 1292(b) in its order granting certification (2A).

The district court's order, however, was entered after consideration of memoranda from both sides which fully addressed the propriety of certification in accordance with the statutory criteria, and the order explicitly set forth the legal issue certified.[15] The district judge was thus clearly aware of the criteria for certification and, in granting the motion for "certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b)", obviously incorporated them by reference and certified that they had been satisfied.[16]

Even if the court of appeals has discretion to establish more formal standards for section 1292(b) certification by district courts in the Fifth Circuit prospectively, it was improper to do so retroactively in order to avoid the merits of this petition,[17]

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15 The order states: "Defendants' motion for certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b) on *the issue of evidentiary use at trial of Fifth Amendment assertions by non-parties* is GRANTED." (8A) (emphasis added).

16 Indeed, Judge Sear had good reason to believe that his reference to § 1292(b) was sufficient since he had previously certified an order in a related case in a similar fashion, *see Ingram Corp.* v. *J. Ray McDermott,* Docket No. 79-2575 (E.D. La. Nov. 2, 1981), and the court of appeals, without comment, had granted leave to appeal. *See Ingram Corp.* v. *J. Ray McDermott & Co.*, Docket No. 81-9828 (5th Cir. Feb. 19, 1982). At that time the court of appeals stated that its docket was not too congested to hear the appeal. *See generally Ingram Corp.* v. *J. Ray McDermott & Co.*, 698 F.2d 1295, 1309 n.24 (5th Cir. 1983).

17 *See, e.g., In re Heddendorf,* 263 F.2d 887, 890 (1st Cir. 1959):

> "We shall not deny the present application for leave to appeal merely upon the absence of an express certificate by the district court as required by § 1292(b), as amended. For present purposes we shall assume, without deciding, that the district court's certificate is sufficient, on the ground that its citation of the statute might perhaps be treated as a 'shorthand' form of the required findings."

As Professor Wright has written, certification such as the one here should be regarded a sufficient because "[i]t would be contrary to the entire tenor of modern federal procedure to disregard the certification

and then to further foreclose review by indicating that the trial court ought not to issue a certificate complying with these newly announced requirements. The Fifth Circuit's action in these cases is not a mere technical error but a major lapse in judicial administration. Unless corrected before trial, it will permit plaintiffs to succeed in their plan of obtaining a judgment in the billions by using Fifth Amendment invocations as highly prejudicial "evidence" of the broadest and most expansive liability their counsel can imagine.[18] If that kind of trial is permitted in these cases, any invocation of the Fifth Amendment in a civil case hereafter will be highly expensive to the invoker's employer or former employer (who has no say in the matter) and a gold mine for opposing counsel.

The denial of leave to appeal by the court of appeals may raise some doubt as to whether these cases are "in" the court

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. . . in question, the purpose of which is so apparent, merely because the precise words of the statute were not used." C. Wright, *The Interlocutory Appeals Act of 1958*, 23 F.R.D. 199, 208 (1959).

18 Judge Sear indicated at argument that he would permit use of Fifth Amendment "evidence" precisely where there is *not* any other evidence on the issue framed in the examiner's questions:

> "THE COURT: . . . I think we now have to divide our issues to those in which you have some form of tangible evidence that would establish the facts, as opposed to those instances or issues in which you're unable by any other means [other than use of the Fifth Amendment invocations as evidence] to establish the fact."
>
> • • •
>
> "Well, do you agree then, Mr. McInerney [counsel for defendants] that . . . where the evidence does not exist in any other form, that a former employee, who is called to testify about events occurring during his employment, would be appropriate, and that a jury would be entitled to know, at least to some extent, that he invokes the Fifth Amendment?"
>
> MR. MCINERNEY: I would not, Your Honor . . . ."
>
> • • •
>
> "[M]y point is that the practice is even more pernicious if the questioner can make up out of whole cloth evidence that doesn't exist anywhere else." Tr. at 63.

of appeals for the purposes of this Court's jurisdiction under 28 U.S.C. § 1254(1). Accordingly, petitioners seek not only the statutory writ but, in the alternative, a common law writ of certiorari to the court of appeals to review its action in denying leave to appeal, and review of the district court's ruling on the motion *in limine*.[19] We recognize that this Court exercises its common law certiorari jurisdiction "sparingly", Sup. Ct. R. 26, but submit that all of the circumstances here combine to make this is a compelling case for granting that writ.[20]

The specter of having to try these unprecedently complex cases twice or even more, the poor reflection on our judicial system that would result, the likelihood that the courts below have badly misinterpreted this Court's decisions in *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), and *Pillsbury Co.* v. *Conboy*,

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19 It is clear that the Court may review the merits of the underlying question. In similar contexts involving discretionary appeals to the court of appeals, this Court has stated that the All Writs Act, now 28 U.S.C. § 1651(a), empowers it to grant a "writ of certiorari to review the action of the court of appeals in declining to allow an appeal to it", and to review not only the court of appeals' exercise of discretion in denying leave to appeal but the merits of the underlying petition. *House* v. *Mayo*, 324 U.S. 42, 44 (1945); *accord, In re 620 Church Street Building Corp.*, 299 U.S. 24 (1936) (reaching merits on common law writ of certiorari to review denial of leave to appeal). And in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), this Court reviewed both the court of appeals' denial of mandamus and the district court's order requiring the defendant to submit to physical examination under Rule 35. Although the court of appeals had not reviewed the district court's determination that there was "good cause" for the examination this Court did so, vacated the order of the court of appeals, and remanded the case to the *district court*.

20 Although the procedural context is different, this case, like *United States Alkali Export Assn.* v. *United States*, 325 U.S. 196, 203-04 (1945), "is not the ordinary one of hardship resulting from . . . denying a preliminary motion". There, "[t]he hardship imposed on petitioners by a long-postponed appellate review" sufficed, when coupled with an additional factor, to warrant review by common law certiorari. Here, the hardship is even greater and there are a number of additional factors which justify granting the writ.

103 S. Ct. 608 (1983), and the likelihood that this "invitation to sharp practice" will spread contagiously if not corrected promptly—all argue for the issuance of the writ which, in these cases, is not only appropriate but essential to sound judicial administration.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Order of the Fifth Circuit, Filed January 26, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-9195

USDC #MDL 417

IN RE: MARINE CONSTRUCTION ANTITRUST LITIGATION,
M.D.L. Docket No. 417,

BROWN & ROOT, INC., ET AL.,

Petitioners,

—versus—

EXXON CORPORATION, ET AL.,

Respondents.

On Application for Leave to Appeal from
an Interlocutory Order

Before:

RUBIN, JOLLY and DAVIS,

Circuit Judges.

BY THE COURT:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Eastern District of Louisiana entered on November 22, 1983, is DENIED.

Memorandum of Decision of the Fifth Circuit, filed January 26, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-9195

IN RE: MARINE CONSTRUCTION ANTITRUST LITIGATION, M.D.L. Docket No. 417.

BROWN & ROOT, INC., ET AL.,
Petitioners,

versus

EXXON CORPORATION, ET AL.,
Respondents.

On Application for Leave to Appeal from an Interlocutory Order

Before:

RUBIN, JOLLY and DAVIS,
Circuit Judges.

BY THE COURT:

The petition for leave to appeal a pretrial ruling concerning the admissibility of evidence in a massive consolidated civil antitrust case, involving approximately twenty-five suits by approximately seventy-five plaintiffs,[1] is denied for want of

1 The cases were consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation in the Eastern District of Louisiana, M.D.L. Docket No. 417.

proper certification by the district court under § 1292(b). Because the district court has the power to issue a correct certification, we also discuss the criteria to be considered in such a case.

During discovery twenty-six present and former employees of the defendants, none of whom is a party to this litigation, and each of whom acted on the advice of his own independent counsel, asserted their privilege against self-incrimination under the fifth amendment and refused to testify in response to some or all questions about the case. The defendants assumed, with justification, that the witnesses would again invoke the privilege if called at the trial. The district court suggested that the issue of the use, if any, that may be made of a non-party witness's claim of fifth amendment privilege, should be resolved well before trial.

The defendants moved *in limine* to bar introduction of any testimony that a witness had invoked the privilege and to preclude reference before the jury to any assertion of the privilege. After considering a magistrate's recommendation that the motion be granted, the district court ruled:

> The use of such evidence will be permitted upon a showing that the evidence is relevant and its probative value substantially outweighs the danger of unfair prejudice, confusion of the issues and is not misleading to the jury.

Appeals from interlocutory orders, save a few specially permitted, were not allowed until 1958. Section 1292(b), adopted by Congress at the recommendation of the Judicial Conference, represents a "departure from the republic-old final judgment rule." 9 *Moore's Federal Practice*, ¶ 110.22[1]. Because certification of a question for interlocutory appeal is exacted by statute, we look first to the district court's certificate.

Memorandum of Decision of the Fifth Circuit, filed January 26, 1984

The requirements of § 1292(b) are explicit:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, *he shall so state in writing in such order.* . . . (Emphasis added.)

Aside from a reference to the legal question involved, the district court's certificate states none of the statutory prerequisites. It recites only "that Defendants' motion for certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b) on the issue of evidentiary use at trial of Fifth Amendment assertions by non-parties is granted."

"Unless the district judge appends the statutory statement, an appeal cannot be supported by § 1292(b)." 9 *Moore's Federal Practice*, ¶ 110.22[3]. The section applies only when the district court "has certified in writing that the criteria for availability [sic] of an interlocutory order are met." *Association of Co-Op Members* v. *Farmland Industries*, 684 F.2d 1134, 1137 n.3 (5th Cir. 1982) (dicta), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1428, ____ L.Ed.2d ____(1983).

The certificate is not boilerplate. The requirement that the district court make an initial determination of appealability was not included in the original Judicial Conference proposal. It was added at the suggestion of Chief Judge Charles E. Clark of the Second Circuit, and "deliberately adopted to secure an initial judgment on the desirability of appeal by the trial judge as the person most immediately familiar with the litigation." 16 C. Wright, A. Miller, E. Cooper, E. Gressman, *Federal Practice & Procedure*, § 3929, p. 138 (hereinafter cited as Wright & Miller). The district judge is in the best position initially to determine not only what the controlling question is and

whether there is substantial ground for difference of opinion concerning it, but also whether its resolution will materially advance termination of the litigation. In the absence of a certification making these determinations, we dismiss the appeal.

The district court certificate may be amended at any time to include the prescribed statement. Fed. R. App. P. 5. For the consideration of the district judge, should application for an amended certificate be made, we discuss whether there is at this time a controlling question of law, an issue briefed by the parties.

The answer to the question attempted to be presented is governed solely by the Federal Rules of Evidence. The appellants do not suggest that the Fifth Amendment would be violated by the admission of the non-parties' assertion of their privilege. A party's invocation of the privilege may be considered against him in a civil case.[2] In an opinion captioned "dissenting" (but actually concurring in the result) in *Lionti* v. *Lloyd's Ins. Co.*, 709 F.2d 237, 244 (3d Cir. 1983), Judge Stern agreed that a party's own invocation of the privilege might warrant an inference against him because "a party, through counsel, [has the ability] to explain and control the contours of his invocation." *Id.* at 245. But he asserted that it would be unfair to allow an inference against a party "when a mere witness, with no stake in the matter, invokes privilege. . . . While a party may be able to deflect the damage of adverse inferences taken from his own invocation through, for example, rehabilitating examination by his counsel, he is unable to defend against an adverse inference drawn against a witness which in turn harms his own case." *Id.*

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2 *Baxter* v. *Palmigiano*, 425 U.S. 308, 98 S.Ct. 1551, 47 L.Ed.2d 810 (1976); *Wehling* v. *CBS*, 611 F.2d 1026, 1027 (5th Cir. 1980). *But cf. Paynes* v. *Lee*, 362 F.Supp. 797 (M.D. La. 1973), *aff'd*, 487 F.2d 1307 (5th Cir. 1974) (barring aeverse inference in civil case because of unusual circumstances, *i.e.*, extremely volatile racial climate).

Memorandum of Decision of the Fifth Circuit, filed January 26, 1984

Even if one adopts Judge Stern's thesis, it is impossible to determine without some sort of factual showing which, if any, of the twenty-six potential witnesses, each of whom is a present or former employee of one of the defendants, is as disinterested as his criterion would require.[3] The district court has not finally decided that any evidence will be admitted or excluded. He has simply decided that some evidence of this kind may be admitted after the trial court balances probative value against prejudice as required by Rule 403, Fed. R. Evid.

The § 1291(b) [sic] order must involve a "clear-cut question of law against a background of determined and immutable facts. For that reason such matters as the sufficiency of pleadings and pre-trial rulings as to the admissibility of evidence are not ordinarily certifiable." 9 *Moore's Federal Practice*, ¶ 110.22[2] at 261 (footnotes omitted), *quoted with approval in Pollock & Riley, Inc.* v. *Pearl Brewing Co.*, 498 F.2d 1240, 1246 (5th Cir. 1974).

Certification of an interlocutory question is not a device for obtaining a dissertation concerning issues that may arise at trial. Reviewing the cases, Wright & Miller say, "a few cases have dealt with pretrial rulings that purport to control the evidence that may be offered at trial. The general view appears to be that such rulings are not ripe for review, since the course of trial may lead to a different ruling." 16 Wright & Miller, *supra*, § 3931, at 171 (footnote omitted).

As the "controlling issue" is stated in the present certificate, its answer would require a broad advisory opinion rather than a specific reply to a specific legal question. A single answer

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3 *Cf.* Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1119 & n.214 (1982) (suggesting that fifth amendment invocations by present employees be treated as vicarious statements of defendant employer; statements by former employees should be treated similarly if there are indications of continuing loyalty to employer).

could suffice only if the answer were either that an assertion of the fifth amendment by a non-party is never admissible in evidence under any circumstances, or that it is always admissible. If such evidence is admissible only under certain conditions, admissibility could not be determined without considering each set of conditions on its specific facts.[4] Some of the conditions on which we are asked to express an opinion may never arise. There is nothing in the record to indicate which questions and responses concerning fifth amendment pleas, if any, the trial court proposes to admit at trial or how it will evaluate their probative value, how that court will balance probative value against unfair prejudice, or how it will instruct the jury concerning the jury's consideration of any answer that might be allowed.

We have held that a pretrial ruling excluding evidence is "not one that presents a controlling question of law or one that can possibly advance the ultimate termination of the litigation." *Pollock & Riley, supra*, 498 F.2d at 1246. When such an evidentiary issue becomes " 'ripe,' the district court trying the case will have the benefit of all factual proof governing the question of relevancy." *Id., quoting Control Data Corp.*, 421 F.2d at 327. When the pretrial ruling proposes the admission of evidence under a test yet to be applied, the same considerations are relevant.

Like the district judge, we are aware of the value that across-the-board determinations may have in preparing complex consolidated cases for eventual trial and would interpret § 1292(b) liberally to attempt to accomplish better preparation of such cases for trial. However, at this juncture and on the record now before us, the effort appears to be at the best premature.

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4 *Cf. Control Data Corp.* v. *International Business Machines Corp.*, 421 F.2d 323, 326-27 (8th Cir. 1970) (refusing to accept interlocutory appeal from order prohibiting reference at trial to consent decrees that had been entered against antitrust defendant).

Order of the District Court Granting Motion for Certification, dated November 22, 1983, filed November 22, 1983

MINUTE ENTRY
SEAR, J.
November 22, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

M.D.L. DOCKET

No. 417

SECTION "G"

IN RE:

MARINE CONSTRUCTION ANTITRUST LITIGATION

IT IS ORDERED that Defendants' motion for certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b) on the issue of evidentiary use at trial of Fifth Amendment assertions by non-parties is GRANTED.

IT IS FURTHER ORDERED that under no conditions will this appeal delay the trial of this matter. Trial will proceed as scheduled even if the Court of Appeals has not rendered a decision on this issue by that date.

MOREY L. SEAR
United States District Judge

Order of the District Court on the Admissibility of Non-Party Witnesses' Fifth Amendment Invocations, dated October 20, 1983, filed October 21, 1983

MINUTE ENTRY
SEAR, J.
OCTOBER 20, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

M.D.L. DOCKET NO. 417

MARINE CONSTRUCTION ANTITRUST LITIGATION

ALL CASES

IT IS ORDERED that the Magistrate's order denying plaintiffs' motion seeking admission of the D. R. Ward dairy [sic] excerpts as business records is affirmed.

IT IS FURTHER ORDERED that defendants' motion for review of the Magistrate's order denying use of the claim of Fifth Amendment privilege is granted, and the Magistrate's order is reversed. The use of such evidence will be permitted upon a showing that the evidence is relevant and its probative value substantially outweighs the danger of unfair prejudice, confusion of the issues and is not misleading to the jury.

IT IS FURTHER ORDERED that defendants' motion for partial summary judgment is denied.

MOREY L. SEAR
United States District Judge

Ruling of the Magistrate on the Admissibility of Witnesses' Fifth Amendment Invocations, dated August 1, 1983, filed August 1, 1983

MINUTE ENTRY
AUGUST 1, 1983
SHAVER, M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

M.D.L. DOCKET NO. 417

SECTION "G" (4)

IN RE:

MARINE CONSTRUCTION ANTITRUST LITIGATION

RULING ON MOTIONS

1. DEFENDANTS' MOTION IN LIMINE EXCLUDING THE USE AT TRIAL OF FIFTH AMENDMENT CLAIMS

GRANTED as to non-party witnesses; DENIED as to parties.

The Fifth Amendment does not forbid an adverse inference against a party to a civil action who refuses to testify in response to probative evidence offered against him. *Baxter* v. *Palmigiano*, 425 U.S. 308, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976). However, the invocation of the Fifth Amendment privilege by a present or former employee of a defendant is a right personal to the witness, and is or should be exercised without interference by the employer-defendant. Thus, the traditional rationale of respondeat superior, the ability of the employer to control the actions of the employee, evaporates in

Ruling of the Magistrate on the Admissibility of Witnesses' Fifth Amendment Invocations, dated August 1, 1983, filed August 1, 1983

the context of a Fifth Amendment assertion by the employee. Furthermore, the assertion of the Fifth Amendment by non-party witnesses in this jury case will unfairly prejudice defendants with evidence that is of slight probative value. *Farace* v. *Independent Fire Insurance Co.*, 699 F.2d 204 (5th Cir. 1983).

2. PLAINTIFFS' MOTION SEEKING ADMISSION INTO EVIDENCE OF D. R. WARD'S DIARIES AS BUSINESS RECORDS

DENIED. The requirements of Rule 803(6), Federal Rules of Evidence, are not met without the testimony of the custodian or other witness as follows:

> (1) that the record sought to be admitted is a record of acts, events, conditions and opinions made at or near the time by, or from information transmitted by, a person with knowledge;
>
> (2) that the record was kept in the course of a regularly conducted business activity; and
>
> (3) that it was the regular practice of the business activity to make the record sought to be introduced.

Pretermitting the question whether the requirements of Rule 803(6) can ever be satisfied without testimonial evidence, I find that in the circumstances of this case, plaintiffs' efforts to qualify the diaries, either by cross-referencing entries or by comparison with other documents, are insufficient to establish the required indicia of trustworthiness. This ruling is without prejudice to plaintiffs' right to seek admission of the diaries on some other basis.

EILEEN GLEASON SHAVER
United States Magistrate

APPENDIX OF CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

Constitutional Provision

The Fifth Amendment to the United States Constitution provides, in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

Statutory Provisions

Section 1292(b) of the Judicial Code, 28 U.S.C. § 1292(b), provides:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Section 1651(a) of the Judicial Code, 28 U.S.C. § 1651(a) provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Rules

Proposed Rule of Evidence 513, 56 F.R.D. 183,260 (1972) (not adopted by Congress) provides:

> "(a) *Comment or inference not permitted.* The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
>
> "(b) *Claiming privilege without knowledge of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.
>
> "(c) *Jury Instruction.* Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom."

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No. 83-1444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCDERMOTT INCORPORATED, *et al.*,
Petitioners,

v.

EXXON CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari, or, in the Alternative, a Common Law Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Fifth Circuit abused its discretion by holding that the District Court's preliminary evidentiary ruling on petitioners' motion *in limine* more than fifteen months prior to trial did not raise a reviewable question under 28 U.S.C. § 1292(b) because the ruling merely restated the standards of the Federal Rules of Evidence and expressly reserved issues of relevance and potential undue prejudice.

2. Whether the District Court and the Fifth Circuit abused their discretion by refusing to rule that Fifth Amendment invocations by a party's officers and employees on deposition must always be excluded from evidence in a civil case as a matter of law and regardless of circumstances.

THE PARTIES BELOW

Respondents are plaintiffs in *In re Marine Construction Antitrust Litigation*, M.D.L. No. 417 (E.D. La.), which is still in discovery in the District Court, and were appellees in the United States Court of Appeals for the Fifth Circuit. Pursuant to Supreme Court Rule 28.1, the parents, affiliates, and subsidiaries (other than wholly-owned subsidiaries) of respondents are listed in an appendix hereto.

Respondents: American Independent Oil Company; American Natural Gas Production Company; American Petrofina Company of Texas; American Petrofina Exploration Company; Aminoil Development Inc.; Aminoil International Inc.; Aminoil U.S.A., Inc.; Amoco Egypt Oil Company; Amoco (U.K.) Exploration Company; Amoco Iran Oil Company; Amoco Norway Oil Company; Amoco Production Company; Amoco Trinidad Oil Company; Arabian American Oil Company; Aramco Overseas Company; Aramco Services Company; Arco British

Limited; Arco Exploration, Inc.; Arco Oil Producing, Inc.; Atlantic Richfield Company; Atlantic Richfield Indonesia, Inc.; BP Alaska, Inc.; The British Petroleum Company, Ltd.; BP Petroleum Development Ltd.; BP Trading Ltd.; Cabinda Gulf Oil Company; Caribbean Gulf Refining Corporation; Clark Oil Producing Company; Coastal Oil & Gas Corp.; Conoco Inc.; The Dow Chemical Company; Dow Chemical International, Ltd.; Drillamex, Inc.; El Paso Natural Gas Company; Esso Exploration & Production Australia, Inc.; Esso Production Malaysia, Inc.; Exxon Corporation; Exxon Pipeline Company; Farmland Industries, Inc.; Finadel, Inc.; Gas Producing Enterprises, Inc.; Herbert I. Goodman (trustee for Gulf Asian Terminals Inc.); Gulf Kuwait Company; Gulf (U.K.) Offshore Investments Ltd.; Gulf Oil Company (Nigeria) Ltd.; Gulf Oil Company of Gabon; Gulf Oil Corporation; Gulf Oil Terminals (Ireland) Ltd.; Gulf of Suez Petroleum Company; Gulf Refining Company; Louisiana Land Offshore Exploration Co., Inc.; Mene Grande Oil Company; Mineracao e Quimica do Nordeste, S.A.; Mobil Eugene Island Pipeline Company; Mobil G-C Corporation; Mobil Oil Exploration & Producing Southwest, Inc.; Mobil Oil Corporation; Norsk Hydro a.s.; Norsk Hydro Produksjon a.s.; The Northwestern Mutual Life Insurance Company; The Offshore Company; Pecten Cameroon; Pecten Malaysia Company; Petroleos Mexicanos; Phillips Petroleum Company; Phillips Petroleum Company, Norway; Shell Explorer Ltd.; Shell Oil Company; Shell Pipe Line Corporation; Signal Oil of Louisiana, Inc.; Sonat Exploration Company; Taranaki Offshore Petroleum Company, Ltd.; The Louisiana Land and Exploration Company; Wintershall Oil & Gas Company; Zaire Gulf Oil Company.

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On Petition for a Writ of Certiorari, or, in the Alternative, a Common Law Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Fifth Circuit, which refused to permit on interlocutory appeal of a preliminary pretrial evidentiary ruling by the District Court.

OPINIONS BELOW

The orders and opinions of the District Court and the Court of Appeals are unreported and are set forth in Petitioners' Appendix at 1A-7A and 8A-9A.[1]

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[1] Citations to the opinions below will be to the Petitioners' Appendix as "Pet. App. ——."

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The provisions of Rules 401-403 of the Federal Rules of Evidences are set forth in an appendix hereto.[2]

RESTATEMENT OF THE CASE

The Prior Criminal Action

These cases, which have been consolidated for pretrial purposes before Judge Morey L. Sear in the Eastern District of Louisiana, have their origins in a criminal investigation of price fixing and collusive bidding in the marine construction industry. In 1978, petitioners Brown & Root, Inc., McDermott Incorporated (then known as J. Ray McDermott & Co., Inc.), and six of their principal officers were indicted and charged with felony violations of Section 1 of the Sherman Act and federal mail and wire fraud statutes. *United States* v. *J. Ray McDermott & Co., Inc.*, Criminal No. 78-422 (E.D. La. Dec. 14, 1978). The criminal defendants all pled *nolo contendere*. The corporate defendants each paid fines of $1 million, the statutory maximum; substantial fines and suspended criminal sentences were also imposed upon the individual defendants. During the course of the criminal proceeding, the government filed a Voluntary Bill of Particulars that described the formation and operation of the conspiracy and named 34 individuals as co-conspirators.

The Civil Actions

Consolidated actions on behalf of petitioners' customers were filed in the wake of the criminal proceeding. The complaints allege that beginning in the 1950s and continuing until at least the late 1970s, petitioners conspired to allocate marine construction projects between themselves, to submit collusive bids on marine construction projects, to fix prices, to standardize the terms and

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[2] 28 U.S.C. § 1292(b) appears at Pet. App. 18.

conditions on which they would perform marine construction services, and to monopolize the marine construction industry. Respondents also allege that petitioners fraudulently concealed their conspiracy.

Liability discovery commenced in February 1982 and ended on January 31, 1984, when the damage phase of discovery began. The District Court has scheduled trial for February 4, 1985.

Fifth Amendment Pleas

During liability discovery, respondents deposed 75 of petitioners' personnel. To date, 27 high ranking present and former officers and managers of petitioners—most of whom were either convicted or named as unindicted co-conspirators in the Voluntary Bill of Particulars in the criminal case—have invoked the Fifth Amendment and refused to answer deposition questions about the conspiracy.[3] The Fifth Amendment witnesses successfully opposed respondents' numerous motions to compel them to testify.

Respondents have been almost totally frustrated in their effort to obtain testimony about the conspiracy. Of the 34 persons named as co-conspirators in the government's Voluntary Bill of Particulars (including the six individual criminal defendants), 28 remained alive at the time of their depositions. Of that number, 23 named co-conspirators asserted the Fifth Amendment on deposition. Four co-conspirator witnesses testified about some knowledge of or participation in the conspiracy during a limited period of time, and one co-conspirator witness denied both knowledge of and participation in the conspir-

[3] In addition to the depositions that respondents have taken, petitioners have taken 385 depositions of respondents' personnel and 13 depositions of third-party witnesses. None of those witnesses has asserted the Fifth Amendment. Petitioners' reference to "500 depositions" (Pet. at 3) includes the enormous number of depositions they have taken.

acy. Thus, over 80 percent of the witnesses most likely to have knowledge relevant to these cases have asserted the Fifth Amendment.

Despite their protestations to the contrary, petitioners have done everything possible to insure that relevant information concerning the conspiracy is not disclosed, including assisting the Fifth Amendment deponents' opposition to respondents' motions to compel testimony, opposing respondents' motions for access to grand jury transcripts (despite a written agreement with the government not to oppose such motions),[4] opposing respondents' efforts to file interrogatories inquiring into the merits of these actions, and paying the legal fees of the Fifth Amendment deponents. Petitioners admit that they have done nothing to encourage testimony by their present and former employees. (Pet. at 11).

In fact, the record demonstrates that petitioners have encouraged their employees *not* to testify. At a hearing before the Louisiana Board of Registration for Professional Engineers and Land Surveyors on whether the engineering licenses of the individual defendants in the criminal case should be revoked, McDermott's General Counsel stated that he had advised McDermott officers not to testify before the Board:

> [B]ecause of the pendency of a great number of civil antitrust litigations against their company, in several of which litigations these gentlemen are named as co-defendants along with the company, *I have advised them that it would be most unwise and even prejudicial to their position in the civil litigation and to their position otherwise and possibly other litigations for them to engage in any explanation of the facts underlying the charges set forth in the indictments*, that is, the charges to which they pleaded nolo contendere [emphasis added.]

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[4] Letter agreements dated December 13, 1978, between U.S. Department of Justice and Denis McInerney, counsel for McDermott, and Richard Keeton, counsel for Brown & Root.

Counsel for one of the individual defendants in the criminal case advised the Board that Brown & Root would prefer that no one who is an officer of the company testify, and that it "would be nice if you really just *stonewall it* on the legal basis. . . ." [emphasis added]. These witnesses later asserted the Fifth Amendment at their depositions.

Contrary to petitioners' claim, respondents have not used the Fifth Amendment pleas to "manufacture evidence." (Pet. at 6). Respondents' questions to all the Fifth Amendment witnesses were based on substantial evidence implicating them in the conspiracy.[5]

The Rulings Below

At least fifteen months prior to trial, petitioners moved *in limine* to exclude any reference to their employees' Fifth Amendment pleas before the trier of fact, thereby raising for the first time in these cases the issue of admissibility of Fifth Amendment pleas. Respondents have never offered any Fifth Amendment pleas into evidence. The Magistrate initially granted petitioners' motion, but the district judge reversed:

> [Respondents'] motion for review of the Magistrate's order denying use of the claim of Fifth Amendment privilege is granted, and the Magis-

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[5] For example, Edward L. Tallichet, a Brown & Root Senior Group Vice President who pled *nolo contendere* in the criminal case, asserted the Fifth Amendment at his deposition. But Mr. Tallichet had earlier described the operation of petitioners' conspiracy in testimony before the Louisiana Board of Registration for Professional Engineers, saying "somewhere in the process they [Brown & Root and McDermott] started saying 'the next one [job] is yours and this one is ours and this one is yours.'" Similarly, Walter S. Gard, a former Brown & Root Senior Vice President and unindicted co-conspirator, refused to testify about a memorandum he wrote to one of his superiors that stated, "Have you made any preliminary shuffle of prospective work in 1970 as between ourselves and our competitors? We should be prepared with a proposal. Can we get a commitment to wash out newcomers?"

> trate's order is reversed. The *use of such evidence will be permitted upon a showing that the evidence is relevant and its probative value substantially outweighs the dangers of unfair prejudice, confusion of the issues and is not misleading to the jury.* [Pet. App. 9A (emphasis added).]

Although the District Court initially refused to certify this ruling for interlocutory appeal under 28 U.S.C. § 1292(b), it later granted petitioners' request for certification. However, the order did not comply with the statutory requirements of Section 1292(b). (Pet. App. 8A).

The Fifth Circuit denied leave to appeal. Citing prior Fifth Circuit precedents, the court concluded that the District Court's failure to recite the prerequisites of Section 1292(b) precluded review.[6] However, because the District Court could cure the inadequate certificate, Judges Rubin, Jolly, and Davis also considered whether the issue of the admissibility of Fifth Amendment pleas was a controlling question of law that should be subject to interlocutory review. They unanimously held that it was not.

The court emphasized that "The district court has not finally decided that any evidence will be admitted or excluded. He has simply decided that some evidence of this kind may be admitted after the trial court balances probative value against prejudice as required by Rule 403, Fed. R. Evid." (Pet. App. 6A). The supposedly "controlling question" that petitioners attempted to raise in the Fifth Circuit was held not to be controlling at all:

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[6] Fifth Circuit precedents preclude interlocutory appeal unless the District Court "has certified in writing that the criteria for appealability of an interlocutory order are met." Association of Co-Op Members v. Farmland Industries, 684 F.2d 1184, 1187-88 n.3 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1428 (1983). While the Fifth Circuit could have denied review on this ground alone (Pet. App. 5A), it nonetheless considered the appeal as though it had been properly certified (*id.*).

"its answer would require a *broad advisory opinion* rather than a specific reply to a specific legal question." (*Id.* at 7A (emphasis added)). The Fifth Circuit noted that:

> There is nothing in the record to indicate which questions and responses concerning fifth amendment pleas, if any, the trial court proposes to admit at trial or how it will evaluate their probative value against unfair prejudice, or how it will instruct the jury concerning the jury's consideration of any answer that might be allowed. [*Id.*]

Because the court was unwilling to hold that Fifth Amendment pleas are never admissible, it found that admissibility could be determined only by considering specific facts involving each witness, which were not in the record. (*Id.*) Thus, the Fifth Circuit concluded that it was premature to resolve the question of the admissibility of Fifth Amendment pleas. Petitioners now seek review by this Court.

ARGUMENT

These are at least two reasons why the Court should deny certiorari. First, petitioners are seeking an interlocutory advisory opinion in the absence of a clear and complete record. Second, since the District Court's order is consistent with all relevant precedents, including an opinion of this Court, there is no likelihood that the Court would reverse the rulings below.

I. THE PETITION SEEKS AN INTERLOCUTORY ADVISORY OPINION ON AN INCOMPLETE RECORD.

Petitioners seek interlocutory review of a District Court pretrial evidentiary ruling, made in an abstract setting, without a trial record. The District Court order did not resolve anything. As the Fifth Circuit stated, "The district court has not finally decided that any evidence will be admitted or excluded." (Pet. App. 6A). The District Court did not conclude that Fifth Amendment

pleas would be relevant or that their probative value will substantially outweigh any possible prejudice. On the contrary, the court expressly reserved the issues of relevance and possible undue prejudice. (Pet. App. 9A). If the trial court ultimately concludes that the evidence is not relevant, it will be excluded. And if the court finds that petitioners would be unduly prejudiced by its admission, it will be excluded. Petitioners remain free to argue those issues at trial and later on appeal.

As the Fifth Circuit recognized, the District Court order merely restated the admissibility standards of the Federal Rules of Evidence. (Pet. App. 6A). Under Rules 401-403, evidence is admissible only if it is relevant and not unduly prejudicial. The District Court has not yet resolved either issue under Rules 401-403.

The Fifth Circuit quite properly refused to exercise its broad discretion under 28 U.S.C. § 1292(b) merely to render a "broad advisory opinion". (Pet. App. 6A). Petitioners now ask this Court to decide an abstract question in a factual vacuum. As the Fifth Circuit noted, there is nothing in the record to indicate what use respondents may seek to make of the Fifth Amendment at trial, which witnesses' Fifth Amendment pleas, if any, will be admitted into evidence at trial, or how the District Court will instruct the jury concerning any evidence that might be admitted. (Pet. App. 7A). The District Court order addressed none of those issues. Thus, this Court is being asked to issue an interlocutory ruling on a complex question without an adequate record. That alone is a sufficient basis for denying certiorari.

The Court should be reluctant to address the complex question raised by the petition in the procedural posture presented here. Petitioners seek an absolute ruling that non-party Fifth Amendment pleas are never admissible in a civil action, regardless of the circumstances of the case or the relationship between the witness and a party.

(Pet. at 6-7).[7] However, if the Court concludes that Fifth Amendment "evidence is admissible only under certain conditions, admissibility could not be determined without considering each set of conditions on its specific facts."[8] (Pet. App. 7A). The Fifth Circuit was properly unwilling to resolve such questions without knowing more about the circumstances of the case, including whether the witnesses are truly distinterested third-parties or agents of the petitioners. (Pet. App. 6A & n.3). Unless this Court is prepared to formulate an absolute rule, which would be contrary to the existing precedents, any decision it makes will necessarily be limited to the unique facts of this case.

II. THE RULINGS BELOW WERE CORRECT.

Petitioners seek a ruling that Fifth Amendment pleas by a party's officers and employees are never admissible into evidence at a civil trial under any circumstances. Both the District Court and the Fifth Circuit refused to so hold. The decisions of both lower courts are consistent with *all* of the relevant precedents, including an opinion of this Court and recent decisions by both the Second Circuit and the Fifth Circuit. There is no conflict among the circuits in this case, and no likelihood that this Court will reach a different result.

Although the rule in *criminal* cases is that no adverse inference can be drawn when a witness asserts the Fifth Amendment privilege, it is well settled that evidence of a witness' refusal to testify on Fifth Amendment grounds is relevant and admissible in a *civil* pro-

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[7] Petitioners never sought such a ruling as a matter of law in either the District Court or the Fifth Circuit.

[8] Even the principal authority cited by petitioners, Judge Stern's separate opinion in Lionti v. Lloyds Ins. Co., 709 F.2d 237, 244 (3d Cir.), *cert. denied*, 104 S. Ct. 490 (1983), would require a determination whether Fifth Amendment witnesses are controlled by parties, a determination that cannot be made on the record before this Court.

ceeding, and that the finder of fact may draw inferences from such refusals to testify. This Court so held in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), where a prison inmate's refusal to testify on Fifth Amendment grounds was considered against him, along with other evidence, in a civil prison disciplinary proceeding. The Court upheld consideration of the Fifth Amendment invocation as evidence, stating:

> Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a *party to a civil cause*." 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961). [425 U.S. at 318 (emphasis in original).]

The Court explained its holding as follows:

> [The Fifth Amendment] has little to do with a fair trial and derogates rather than improves the chances for accurate decisions. Thus, aside from the privilege against compelled self-incrimination, the Court has consistently recognized that in proper circumstances silence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause. Indeed, as Mr. Justice Brandeis declared . . . "Silence is often evidence of the most persuasive character." [*Id.* at 319 (citations omitted).]

Later, in *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977), the Court explained that *Baxter* permits "an inference to be drawn in a civil case from a party's refusal to testify." There can be no question that the *Baxter* rule of admissibility applies to this civil action.

Since *Baxter*, the lower courts have consistently admitted Fifth Amendment invocations in civil cases. For instance, in *National Acceptance Co. v. Bathalter*, 705 F.2d 924, 929-30 (7th Cir. 1983), the court wrote:

> After *Baxter* there is no longer any doubt that at trial a civil defendant's silence may be used against him, even if the silence is an exercise of his constitutional privilege against self-incrimination. Thus, if this case were to go to trial, [National Acceptance Company] would be entitled to the benefit of an adverse inference against Bathalter if he declined to answer a question and invoked his Fifth Amendment privilege, although *Baxter* does not hold that an adverse finding could properly rest on the silence, without other evidence.

Similarly, in *Wehling v. Columbia Broadcasting System*, 611 F.2d 1026 (5th Cir. 1980), the Fifth Circuit, citing *Baxter*, held that a defendant was entitled to rely on an adverse inference from plaintiff Wehling's Fifth Amendment plea:

> Although Wehling could continue to assert his Fifth Amendment rights at trial, it is clear that *his invocation of the privilege would be subject to the drawing of an adverse inference by the trier of fact.* [*Id.* at 1027 (emphasis added).]

Accord, e.g., McKinney v. Galvin, 701 F.2d 584, 589 n.10 (6th Cir. 1983); *Oak Systems of Chicago v. Fiddlers, Inc.*, No. 81-C-6901 (N.D. Ill. Feb. 22, 1984); *SEC v. Musella*, 1984 Fed. Sec. L. Rep. (CCH) ¶ 99,637 (S.D.N.Y. 1984).

The Fifth Circuit's recent decision in *Farace v. Independent Fire Ins. Co.*, 699 F.2d 204 (5th Cir. 1983), is also consistent with *Baxter*. In *Farace*, the court wrote that "even the dissent in *Baxter* recognized that such an [adverse] inference is permissible in civil litigation between private parties." *Id.* at 210. Citing a recent Yale Law Journal article,[9] the court noted that there

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[9] Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062 (1982). The Fifth Circuit also cited the same article in its opinion in this case. (Pet. App. 6A n.3).

is no constitutional ground for exclusion of Fifth Amendment pleas in civil cases. *Id.* *All* reported cases decided since *Baxter*, and one case preceding *Baxter*, have held that in civil cases Fifth Amendment claims by present or former employees of parties may be considered by the trier of fact, which may draw adverse inferences against the party-employer.[10]

In its very recent decision in *Brink's Inc. v. City of New York*, the Second Circuit affirmed Judge Weinfeld's decision to admit the deposition Fifth Amendment pleas of Brink's employees who stole the City's parking meter revenues. Writing for the Second Circuit, Judge Oakes noted the distinction between the Fifth Amendment issue in civil and criminal cases. 717 F.2d at 709. Citing *Baxter*, the court agreed that the self-incrimination claims were relevant: 'the employees' claims of privilege were admissible and competent evidence under the circumstances of this case, given the fact there is no constitutional mandate . . . against their admission." *Id.* at 710 (citation omitted). The court emphasized that determinations of prejudice are within the discretion of the trial court. *Id.* It concluded that the Fifth Amendment pleas were not inflammatory, but merely supported the City's position, and thus admission of such evidence was not unduly prejudicial. *Id.* Petitioners' only answer to *Brink's* is to embrace the dissent. (Pet. at 12).

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[10] *See* Brink's Inc. v. City of New York, 717 F.2d 700, 707-10 (2d Cir. 1983) (rehearing denied Oct. 19, 1983); United States v. Mammoth Oil Co., 14 F.2d 705, 729-30 (8th Cir. 1926), *aff'd*, 275 U.S. 13 (1927); Compass Ins. Co. v. Acella Chrysler-Plymouth, Inc., No. 80 Civ. 5608 (HFW) (S.D.N.Y. July 25, 1983); Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc., 1983-1 Trade Cas. (CCH) ¶ 65,332 (S.D.N.Y. 1983); E. H. Boerth Co. v. LAD Properties, 82 F.R.D. 635, 644-45 (D. Minn. 1979); Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart Inc., 465 F. Supp. 585, 591 (M.D. La. 1979). *See also* Little Rock School District v. Borden, Inc., No. LR-76-C-41 (E.D. Ark. Dec. 12, 1980); In re Corrugated Container Antitrust Litigation, M.D.L. Docket No. 310, Pretrial Order 51 (S.D. Tex. May 23, 1980).

None of the cases petitioners cite is contrary authority. The court in *Lionti v. Lloyd's Ins. Co.*, 709 F.2d 237, 243 n.10 (3d Cir.), *cert. denied*, 104 S. Ct. 490 (1983), expressly declined to reach this question; only Judge Stern discussed it in a separate opinion. *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983), never addressed the admissibility of Fifth Amendment pleas. The issue in *Pillsbury* was whether witnesses who had given immunized grand jury testimony should be compelled, over Fifth Amendment pleas, to answer deposition questions that "tracked" their grand jury testimony. In short, no case has ever held as petitioners ask this Court to hold. All authority is contrary to their position.

All of the Fifth Amendment witnesses in these cases are present or former trusted high-level officers or management employees of petitioners. Their conduct undertaken within the scope of their employment was the conduct of petitioners since a corporation can act only through its employees and agents. In their business affairs, petitioners spoke, acted, or failed to act through these witnesses. If petitioners chose to testify at trial about the conspiracy, they would do so through the testimony of the Fifth Amendment witnesses.

The deposition questions put to the Fifth Amendment witnesses concerned their knowledge of and participation in a price-fixing conspiracy involving and benefiting their employers. Unquestionably, if these witnesses had testified as to their knowledge of the conspiracy, their testimony would be admissible against their employers, Brown & Root and McDermott. The courts have properly determined that corporate parties in *civil* litigation cannot hide behind the Fifth Amendment pleas of their employees.

CONCLUSION

As this Court recently stated, "even if the District Judge certifies the order under § 1292(b), the appellant still 'has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after entry of a final judgment.' The appellate court may deny the appeal for any reason, including docket congestion." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978) (citation omitted). Petitioners failed to persuade the Fifth Circuit that there were any "exceptional circumstances" here, and it therefore denied review. Petitioners have not met their heavy burden of showing why this Court should review an abstract interlocutory ruling.

Petitioners seek a decision by this Court that the Fifth Amendment pleas of a party's officers and employees are never admissible in civil cases under any circumstances. Even if relevant precedents did not hold to the contrary, this Court should not consider making such a decision in the absence of a concrete offer of proof in an actual trial setting.

For the reasons stated herein, certiorari should be denied.

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APPENDICES

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The pertinent portions of the Federal Rules of Evidence provide:

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

APPENDIX B

PARENTS, AFFILIATES AND SUBSIDIARIES OF RESPONDENTS

AMERICAN NATURAL GAS PRODUCTION CO.

Parent Company: American Natural Resources Company

Subsidiaries and affiliates (not wholly owned):

Trans Canada Pipeline Company Ltd.
ANR Pipeline Company

AMERICAN PETROFINA COMPANY OF TEXAS

Petrofina, S. A.
Finachem International Company Limited
American Petrofina Holding Company
Finacor, Inc.
Petrobelge
American Petrofina of Italy, S.p.A.
Finacoal, Inc.
American Petrofina Exploration Company
American Petrofina Exploration Company of Norway
Finaterre Inc.
Petrofina Delaware, Incorporated
APCOT-Finadel Joint Venture
Finachem, U. S.
Finadel Pipe Line Company
American Petrofina, Incorporated
Fina Supply Inc.
American Petrofina Marketing Inc.
Petrofina—U.S. Incorporated
Coe-Mar, Incorporated
Cosden Oil & Chemical Company
Viny Limited
Fina United Corporation
River Pipeline Company

The Pit Stop, Inc.
Finaserve, Inc.
Hercofina Europe
Cosden Technology, Inc.
Trust Pipe Line Company
S & S Gas Mart, Inc.
Porta Fina Oil Company
Hercofina
American Petrofina of Venezuela, S.A.
Cosden International Sales Corporation
Fast Track, Inc.
Hercofina (Delaware)
Cosden Pipe Line Company
Emejota Engineering Corp.
Comanche Springs Fuel Center, Inc.
Inco Oil Company
American Petrofina Pipe Line Company
Sitma Coatings, Inc.
Vercon Inc.
Petro-Phenix, Inc.
Petcon, Incorporated
Capitol Fina Pipe Line Company
Mid-County Chemical Company
Cosden, Inc.
Dal-Fin, Inc.
Maxi-Serve, Inc.
Fin-Tex Pipe Line Company
The K-T Oil Company
Cos-Mar, Company
Toby, Incorporated
Gulf Coast Data Fleet, Inc.
The American Petrofina Foundation
Petro-Mark, Inc.
Fin-Oil, Inc.
Carville Properties, Inc.

AMINOIL INC.

Parent Company: R. J. Reynolds Industries, Inc.

Subsidiaries and affiliates (not wholly owned):

Long Beach Oil Development Co.
Solar Gas, Inc.
Iranian Oil Services Holdings Ltd.
Pars Investment Corp.
Iranian Oil Participants Ltd.
Iricon Agency Ltd.
Minas y Petroleos del Ecuador
Petrolera Yusani S.A.
Central African Petroleum Refineries Ltd.

AMOCO PRODUCTION COMPANY

(Limited to entities with stock or debt securities publicly traded in the United States or Canada)

Parent Company: Amoco Production Company is a wholly-owned subsidiary of Standard Oil Company (Indiana).

Subsidiaries and affiliates (not wholly owned):

Amoco Australia Limited
Amoco Canada Petroleum Company, Ltd.
Amoco Credit Corporation
Amoco Oil Holdings S.A.
Amoco (U.K.) Exploration Company
Analog Devices Inc.
Cetus Corporation
Cyprus Mines Corporation

ATLANTIC RICHFIELD COMPANY

Alpart Farms (Jamaica) Ltd.
Alumina Contractors Limited
Alumina Partners of Jamaica
Alyeska Pipeline Service Company

The Ambler Mining Company
Anaconda Exploration New Zealand Limited
Anaconda Holdings Do Brasil LTDA
Anaflex S.A. de C.V.
Anamax Mining Company
ARCO Australia Coal Pty. Ltd.
ARCO Solar Nigeria Ltd.
Arilan, S.A. de C.V.
Arpet Petroleum Limited
A/S Skaland Grafitiverk
Atlantic Richfield de Mexico, S.A. de D.V.
Aughnish Alumina Limited
Aughinish Estates Limited
Aughinish Finance Limited
Aughinish Property (Nominees) Limited
Badger Pipeline Company
Bingham Development Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
The British American Metals Company, Limited
Candel International Limited
Caribou-Chaleur Bay Mines Ltd.
Caribou-Smith Mines Ltd.
Centroamericana de Cobre, S.A.
Chile Copper Company
Cobre de Hercules, S.A.
Cobre de Mexico, S.A.
Cobrecel, S.A. de C.V.
Colonial Pipeline Company
Compania de Petroleo Ganso Azul, Ltda.
Compania Minera Dos Republicas, S.A. de C.V.
Compania Minera Kappa, S.A.
Compania Minera Penacobre, S.A.
Cook Inlet Pipe Line Company
Cupro San Louis, S.A. de C.V.
Curragh Coal Sales
Delaware Bay Transportation Company
Dexter de Mexico, S.A.

Dixie Pipeline Company
East Texas Salt Water Disposal Co.
85819 Canada Limited
Eisenhower Mining Company
Empresa de Comercio Exterior Mexicano, S.A. de C.V.
Energy Transportation Systems, Inc.
Ericsson, Inc.
Flower Street Limited
F.T.L. Company Limited
Gravity Adjustment, Inc.
Greater Pacific Limited
Griffith-Consumers Company
Hardy Oil Company
Imperial Eastman de Mexico, S.A.
Impulsora De Cobre, S.A. de C.V.
Industrias Nacobre, S.A. de C.V.
Industria Tecnos, S.A. de C.V.
Iricon Agency Ltd.
Jamaica Alumina Security Company, Ltd.
Kenai Pipe Line Company
Kronos, Computacion y Teleproceso, S.A. de C.V.
Kuparuk Transportation Capital Corporation
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Lavan Petroleum Co.
Lingobronce, S.A.
Manguera Flex, S.A. de C.V.
Manufacturera Mexicana De Partes Para Automoviles, S.A. de C.V.
Mayflower Mining Company
R.W. Miller (Holdings) Limited
Minera Anaconda Limitada
Montoro, Empresa Para La Industria Quimica Nacional de Cobre, S.A.
New Bingham Mary Mining Company
Nihon Oxirane Company, Ltd.
Nordisk Mineselskab, A.S.
Oil Shipper Service, Inc.
P.T. Arutmin Indonesia

Park City Ventures
Park Cummings Mining Company
Park Premier Mining Company
Participaciones Mexicanas, S.A. de C.V.
Platte Pipe Line Company
Prince Consolidated Mining Company
Productos Especiales Metalicos, S.A.
Richfield U.K. Petroleum, Limited
Rodman, Inc.
The Saudi Cable Company
Servicios Industriales Nacobre, S.A.
Sinclair U.K. Oil Company Limited
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Sociedada Anonima Marvin
Solar Energy Center (E.C.)
Solvamex, S.A. de C.V.
Sumiarco Company Limited
Swecomex, S.A.
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company
Tubos Flexibles, S.A.
Union de Credito Industrial Vallejo, S.A.
United Park City Mines Company
The Walworth Company
West Mayflower Mining Company
William Prym de Mexico, S.A.

BRITISH PETROLEUM COMPANY, LTD.

Standard Oil Company (Ohio)
AMAX Inc.

COASTAL OIL AND GAS CORP.

Parent Company: The Coastal Corporation

Subsidiaries and affiliates (not wholly owned):

Colorado Interstate Corporation
Colorado Interstate Gas

CONOCO INC.

(Limited to entities with stock or debt securities publicly traded in the United States or Canada)

Parent Company: Conoco Inc. is a wholly-owned subsidiary of Conoco Delaware, Inc., which is a wholly-owned subsidiary of E. I. Dupont de Nemours and Company.

Subsidiaries and affiliates (not wholly-owned):

Big Sky of Montana Realty, Inc.
Cit-Con Oil Corporation
Conch International Methane Ltd.
Conch L.N.G.
Conoco Exploration, Ltd.
Bishop Coal Company
Conrhein Coal Co.
Cardinal River Coals, Ltd.
Neptune Bulk Terminals (Canada) Ltd.
Contochu Inc.
Harmar Coal Co.
Itmann Coal Co.
Mathies Coal Co.
Tongue River Railroad
Oasis Oil Co. of Libya, Inc.
Colonial Pipeline Company
Dixie Pipeline Company
Explorer Pipoline Company
Lake Charles Pipe Line Company
Pioneer Pipe Line Company
Platte Pipe Line Company
Seadock, Inc.
Seaway Pipeline, Inc.
Texas Offshore Port, Inc.
West Shore Pipe Line Company
Yellowstone Pipe Line Company
Felix Oil Company
Jupiter Chemical Inc.
Long Beach Oil Development Company

Kettleman North Dome Assoc.
Maritime Protection Inc.
Oil Shippers Service, Inc.
Petroleum Terminals, Inc.
Iricon Agency, Ltd.
Southern Facilities, Inc.
The Standard Shale Products Company
Tidelands Royalty Trust
Airport Limited Partnership
Concord Limited Partnership
Du Pont Canada Inc.
PD Glycol Limited
Syngas Company
Wilmington Trust Company

THE DOW CHEMICAL COMPANY

Alamo Land Co.
Dow-Corning Corp.
Cordis Dow Corp.
J V Chemicals

DRILLAMEX, INC.

Parent Company: American Express Co.

EL PASO NATURAL GAS COMPANY

Parent Company: The El Paso Company

EXXON CORPORATION

(Limited to entities with stock or debt securities publicly traded in the United States or Canada)

Exxon Finance N.V.
Exxon Pipeline Company
Exxon Shipping Company
Imperial Oil Limited
Intecom, Inc.
Reliance Electric Company
Supertex, Inc.

GULF OIL CORPORATION

Parent Company: Gulf Corporation

Subsidiaries and affiliates (not wholly-owned):

A/S Jargul
A/S Jargul & Co. K/S
Allied General Nuclear Services
Asia Polymer Corp.
Bio Research Center Company Limited
Britamco Ltd.
Cayman Kewanee, Ltd.
Chicago Wire Goods Co.—H/FP
China Gulf Oil Company Limited
Colonial Pipeline Company
Componentes Industriales Mexicandes, S.A.
Delaware Bay Transportation Company
Dixie Pipeline Company
Electronic Marketing Systems Inc.
Emery Joint Venture
The G.S. Equipment and General Supply Company—H/FP
General Atomic Europe Development Corporation
Gulf Canada Limited
Gulf Oil Financial Corporation
Gulf Oil Realty Company
Gulf Oil Zaire S.A.R.L.
Harshaw—Juarez S.A. De C.V.—H/FP
Harshaw Chemical of Canada, Ltd.—H/FP
Harshaw Chemicals Limited—H/FP
Harshaw Chemie B.V.—H/FP
Harshaw Chemie G.M.B.H.—H/FP
Harshaw Galvanotecnia S.A.—H/FP
Harshaw Holland N.V.—H/FP
Harshaw International Corporation—Disc—H/FP
Harshaw Nuclear Electronics, Inc.—H/FP
Harshaw-Bryce & Co. Pty. Ltd.—H/FP
Harshaw-Murata Kabushiki Kaisha—H/FP
Harshaw-Filtrol Partnership—H/FP

Hochtemperatur-Reactorbau GMBH
Hong Kong Refueling Company Ltd.
Industrial Nickel, Inc.—H/FP
Insco Holding & Finance Company N.V.
Insco Limited
Kayeye Insurance Company, Ltd.
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Lancer Chemical Corporation—H/FP Name Holder
Laurel Pipe Line Company
Mid-Valley Pipeline Company
Midwest Carbide Corporation
North River Energy Company
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company
Paloma Pipe Line Company
Pembroke Capital Company
Pembroke Cracking Company
Plastigama, S.A.
Platte Pipeline Company
Produtos Quimicos Somox, Ltda.—H/FP
Raffinerie De Cressier S.A.
Rio Blanco Oil Shale Partnership
Sarni S.P.A.—Refining
Solvent Refined Coal International, Inc.
Stibium, Inc.—H/FP
Sunrise International Company Limited
Taita Chemical Corporation
Transinsco Inc.
Transocean Group, Inc.
Valley Pines Associates
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company
Gulf Pipeline Company (formerly Gulf Refining Company)
Cabinda Gulf Oil Company
Gulf Oil Company of Gabon
Zaire Gulf Oil Company

Gulf Oil Zaire S.A.R.L.
Gulf Oil Company (Nigeria) Limited
Transocean Gulf Oil Company
Mene Grande Oil Company
Caribbean Gulf Refining Corporation
Gulf (U.K.) Offshore Investments Limited
Gulf Oil Terminals (Ireland) Limited
Kupan International Company
Gulf Oil Trading Investments Limited
Gulf Oil Trading Company, Limited
Gulf Kuwait Company
Herbert I. Goodman, Trustee for Gulf Asian Terminals, Inc.

THE LOUISIANA LAND AND EXPLORATION COMPANY

Copper Range Company
Smokey Valley Mining Company
Kalua Koi
Kapuhi Partnership

MOBIL OIL CORPORATION

(Limited to entities with stock or debt securities publicly traded in the United States or Canada)

Mobil Alaska Pipeline Company

NORSK HYDRO A.S.

Heger Plastics A/S
A/S Mowi
Roldal-Suldal Kraft A/S
Vefi A/S
Hydro Thai Limited
A/S Korn og Foderstof Kompagniet
A/S Korn-og Godningsforretningen af 1.10.1970
Norsk Hydro Danmark a.s
Norsk Hydro (M) Sdn. Bhd.

Diamond Fertilizer and Chemical Co. Ltd.
Scanitro Ltd.
Norala AG
Skogens Godslings AB
Supra AB
Transnitro, Inc.
Sameiet Alkali
I/S Felleslager
Hydrokem I/S
I/S Noretyl
I/S Norpolefin
I/S Pallebater
Rafinor A/S & Co.
I/S Roldal-Suldal Kraft
I/S Skafsa Kraftverk
I/S Sundsfjord Kraftlag
Dansk Norsk Kvaelstoffabrik I/S

THE NORTHWESTERN
MUTUAL LIFE INSURANCE CO.

The Regis Group, Inc.
Genesis Project N.V. & Subs., Inc.
Capitol Court Corp.
Evans Food Products Company
Teleco, Inc.
First Mortgage Company of Texas, Inc.
Futura Gear Works, Inc.
Weingarten Properties, Inc.
All-Pro Broadcasting, Inc.
Genesis Project N.V. & Subs., Inc.

PHILLIPS PETROLEUM COMPANY

Aero Oil Company
Phillips Pacific Chemical Company
The Salk Institute Biotechnology/Industrial Assoc., Inc.
Bruin Carbon Dioxide Sales Corporation
Canyon Reef Carriers Inc.

Kenai LNG Corporation
Phillips Gas Supply Corporation
White River Shale Oil Corporation
Alyeska Pipeline Service Company
Chisholm Pipeline Company
Colonial Pipeline Company
Dixie Pipeline Company
Everglades Pipe Line Company
Explorer Pipeline Company
Kaw Pipe Line Company
Powder River Corporation
Seadock, Inc.
Seaway Pipeline Inc.
Texas Offshore Port, Inc.
Papago Chemicals, Inc.
Transatlantic Reinsurance Company
LeeFac, Inc.
Acurex Corporation

Phillips Petroleum Company Norway

Parent Company: Phillips Petroleum International Investment Company

SHELL OIL COMPANY

Quazite Corporation
First Harlem Securities Corporation
Fractionation Research
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
LOOP, Inc.
MESBIC Financial Corporation of Houston
Oil Companies Institute for Marine Pollution Compensation
Oil Insurance Limited
Pioneer Equipment Co.
Seadock, Inc.

Shell Mining Company
Shell Western E&P Inc.

Shell Energy Resources

Shell Mining Company
Shell Western E&P Inc.

Pecten International Company

Pecten Cameroon Company

Shell Western E&P Inc.

East Texas Salt Water Disposal Company
Grand Ecallie Land Company, Inc.
Van Salt Water Disposal Company
WIDC (Wyoming Industrial Development Corporation)

Quazite Corporation

Plastibeton, Inc.

Shell Pipe Line Corporation

Butte Pipe Line Company
Dixie Pipeline Company
Explorer Pipeline Company
LOCAP, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company

No. 83-1444

Office - Supreme Court, U.S.
FILED
APR 18 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MCDERMOTT INCORPORATED, MCDERMOTT INTERNATIONAL, INC., BROWN & ROOT, INC., and HALLIBURTON COMPANY,
Petitioners,

—against—

EXXON CORPORATION, ET AL.,
Respondents.

IN RE MCDERMOTT INCORPORATED, MCDERMOTT INTERNATIONAL, INC., BROWN & ROOT, INC., and HALLIBURTON COMPANY,
Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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American Independent Oil Company; American Natural Gas Production Company; American Petrofina Company of Texas; American Petrofina Exploration Company; Aminoil Development Inc.; Aminoil International Inc.; Aminoil U.S.A., Inc.; Amoco Egypt Oil Company; Amoco (U.K.) Exploration Company; Amoco Iran Oil Company; Amoco Norway Oil Company; Amoco Production Company; Amoco Trinidad Oil Company; Arabian American Oil Company; Aramco Overseas Company; Aramco Services Company; Arco British Limited; Arco Exploration, Inc.; Arco Oil Producing, Inc.; Atlantic Richfield Company; Atlantic Richfield Indonesia, Inc.; BP Alaska, Inc.; The British Petroleum Company Ltd.; BP Petroleum Development Ltd.; BP Trading Ltd.; Cabinda Gulf Oil Company; Carribean Gulf Refining Corporation; Clark Oil Producing Company; Conoco Inc.; The Dow Chemical Company; Dow Chemical International, Ltd.; Drillamex, Inc.; El Paso Natural Gas Company; Esso Exploration & Production Australia, Inc.; Esso Production Malaysia, Inc.; Exxon Corporation; Exxon Pipeline Company; Farmland Industries, Inc.; Finadel, Inc.; Gas Producing Enterprises, Inc.; Herbert I. Goodman (trustee for Gulf Asian Terminals Inc.); Gulf Kuwait Company; Gulf (U.K.) Offshore Investments Ltd.; Gulf Oil Company (Nigeria) Ltd.; Gulf Oil Company of Gabon; Gulf Oil Corporation; Gulf Oil Terminals (Ireland) Ltd.; Gulf of Suez Petroleum Company; Gulf Refining Company; Mene Grande Oil Company; Mineracao e Quimica do Nordeste, S.A.; Mobil Eugene Island Pipeline Company; Mobil G-C Corporation; Mobil Oil Exploration & Producing Southwest, Inc.; Mobil Oil Corporation; Norsk Hydro a.s.; Norsk Hydro Produksjon a.s.; The Northwestern Mutual Life Insurance Company; The Offshore Company; Pecten Cameroon; Pecten Malaysia Company; Petroleos Mexicanos; Phillips Petroleum Company; Phillips Petroleum Company, Norway; Shell Explorer Ltd.; Shell Oil Company; Shell Pipe Line Corporation; Signal Oil of Louisiana, Inc.; Sonat Exploration Company; Taranaki Offshore Petroleum Company, Ltd.; Terra Resources, Inc.; Valero Energy Corporation; Wintershall Oil & Gas Company; Zaire Gulf Oil Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1444

MCDERMOTT INCORPORATED,
MCDERMOTT INTERNATIONAL, INC.,
BROWN & ROOT, INC., and HALLIBURTON COMPANY,

Petitioners,

—against—

EXXON CORPORATION, ET AL.,

Respondents.

IN RE MCDERMOTT INCORPORATED,
MCDERMOTT INTERNATIONAL, INC.,
BROWN & ROOT, INC., and HALLIBURTON COMPANY,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Respondents' Brief in Opposition ("Br. Opp.") states that petitioners are seeking "an absolute ruling that non-party Fifth Amendment pleas are never admissible in a civil action" (p. 8).[1] Rather inconsistently, respondents on the same page assert that "petitioners never sought such a ruling" from the courts

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1 Respondents' overstatement of petitioners' position is a fair description of the intended effect of proposed Rule 513, which was adopted by this Court in 1972 by a vote of eight to one (*see* Petition for a Writ of Certiorari, hereinafter "Petition" pp. 11-12, 25).

below (p. 9 n. 7) and that those courts "refused to so hold" (p. 9). What petitioners have sought and are seeking (and what the magistrate granted, the district court denied, and the court of appeals refused to consider) is a ruling that, in the absence of connivance by a party, Fifth Amendment assertions by non-party employees (and former employees) acting on the advice of independent counsel are inadmissible as evidence of the "facts" asserted in the questions put to them.[2]

The issue thus presented is not, as respondents' principal argument assumes, an "abstract question [posed] in a factual vacuum" (Br. Opp. p. 8). The district judge presiding over these cases *sua sponte* invited the parties to move *in limine* with respect to the admissibility of the Fifth Amendment assertions in depositions to be offered at trial. Thereafter, the parties developed a complete factual record on all aspects of the motion, including specific questions posed to the witnesses at their depositions (with the foreknowledge that they would assert their Fifth Amendment privilege) and the use plaintiffs intend to make of this "testimony" at trial (*see, e.g.*, Petition p. 4). Each of the witnesses involved is a non-party. Many of them had long since ceased to be employees; several have since died; others reside beyond the district court's subpoena power.

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2 At every level, and again in this Court, respondents have alleged that petitioners "have encouraged their employees *not* to testify" (Br. Opp. p. 4). In the trial court, petitioners disproved this unsupported allegation by a factual showing (including affidavits from counsel for the witnesses) which has never been contradicted by any witness or document. Accordingly, the magistrate rejected plaintiffs' contention; the district judge stated at the argument that it is "not an issue" (transcript of 10/5/83 hearing before Judge Sear at 73); and the court of appeals wrote: "each of [the individuals asserting the privilege] acted on the advice of his own independent counsel" (Petition p. 3A). Similarly, respondents' claim that petitioners encouraged certain employees not to testify in another proceeding before a Louisiana licensing board was raised and rejected below. There were no Fifth Amendment claims in the board proceeding and the record below includes uncontested affidavits from counsel for those employees contradicting the charge of employer influence.

Their depositions are now completed, and none of them intends to waive the privilege and testify. Thus, most (if not all) of them will be wholly unavailable at trial.

In short, it is quite clear that these depositions will be offered at trial, that the issue then will be the same as that presented to this Court now, and that the record then will be exactly what it is now. We therefore submit that the district court was correct in certifying the question as ripe for appellate review on this record at this time. The trial is scheduled to commence next year. If it is a consolidated trial, it could well consume more than a year; even a more expeditious alternative (such as trial by geographic area or a single "bellwether" case), will probably take in excess of six months. Only the grant of this petition can avoid the monumental waste of judicial and private resources that will result if the rulings below are incorrect.

Respondents do not challenge this, but urge that the ruling below is correct and consistent with "*all* of the relevant precedents" (Br. Opp. p. 9). This too is demonstrably untrue.[3] It ignores this Court's repeated condemnation of "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment" as well as its warning that "the privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as

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3 *See, e.g., Farace* v. *Independent Fire Insurance Co.*, 699 F.2d 204 (5th Cir. 1983); *Brenner* v. *World Boxing Council*, 675 F.2d 445, 454 n.7 (2d Cir.), *cert. denied*, 103 S. Ct. 79 (1982); *United States* v. *5 Cases, More or Less, Containing "Figlia Mia Brand"*, 179 F.2d 519 (2d Cir.), *cert. denied*, 339 U.S. 963 (1950); *Rockwood Computer Corp.* v. *Morris*, 94 F.R.D. 64 (E.D.N.Y. 1982). *See also Depew* v. *Hanover Insurance Co.*, 73 F.R.D. 101, 103 (E.D. Tenn. 1976) ("a person who claims his privilege against self-incrimination under the federal common-law is entitled to an instruction that such exercise permits no adverse inference . . . ."); *Paynes* v. *Lee*, 362 F. Supp. 797, 800 (M.D.La. 1973), *aff'd per curiam*, 487 F.2d 1307 (5th Cir. 1974) ("[c]ertainly no inference adverse to the defendant could be drawn from his having followed this advice [of his attorney to invoke his Fifth Amendment privilege].").

equivalent either to a confession of guilt or a conclusive presumption of perjury."[4]

The policy considerations against permitting such an inference of guilt are so strong that even a defendant accused of murder was not permitted to attempt to establish his innocence by using the assertion of the privilege by the non-party witness whom he claimed (with some evidence) to have been the perpetrator of the crime. In *Bowles* v. *United States*, 439 F.2d 536 (D.C. Cir. 1970) (en banc), *cert. denied*, 401 U.S. 995 (1971), the court so held for the following reasons:

> "The jury may think it high courtroom drama of probative significance when a witness 'takes the Fifth.' In reality the probative value of the event is almost entirely undercut by the absence of any requirement that the witness justify his fear of incrimination and by the fact that it is a form of evidence not subject to cross-examination." 439 F.2d at 541-42.[5]

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4 *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 557 (1956). *See also Ullmann* v. *United States*, 350 U.S. 422, 426-27 (1956) (hailing the privilege as "one of the great landmarks in man's struggle to make himself civilized."): *See generally Minnesota* v. *Murphy*, 104 S.Ct. 1136, (1984); *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 806 (1977); *Lefkowitz* v. *Turley*, 414 U.S. 70, 81 (1973); *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 283-84 (1968); *Gardner* v. *Broderick*, 392 U.S. 273, 279 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493, 499 (1967); *Spevak* v. *Klein*, 385 U.S. 511, 515 (1967).

5 *Accord United States* v. *Martin*, 526 F.2d 485, 487 (10th Cir. 1975) ("[t]he trial court did not err in refusing to permit the informant to be called to the stand [at defendant's request] and thus be compelled to invoke his Fifth Amendment rights in the presence of the jury."); *United States* v. *Lacouture* 495 F.2d 1237, 1240 (5th Cir.), *cert. denied*, 419 U.S. 1053 (1974) (the "probative force [of the invocation of the privilege] is weak and it cannot be tested by cross-examination."); *United States* v. *Johnson*, 488 F.2d 1206, 1211 (1st Cir. 1973) ("[N]either side has the right to benefit from any inferences the jury may draw simply from the witness' assertion of the privilege either alone or in conjunction with questions that have been put to him.").

Our petition relied on this Court's decision last Term in *Pillsbury Co.* v. *Conboy*, 103 S. Ct. 608, refusing to compel testimony by a former employee of an antitrust defendant who, asserting his Fifth Amendment privilege, would not acknowledge his immunized grand jury testimony. We pointed out that the Court concluded that (even if a limited acknowledgement were compelled), because the witness could lawfully assert the privilege to any question which did more than ask him to affirm that he gave the prior testimony, the deposition would not be subject to cross-examination and would therefore be inadmissible. *Id.* at 615-16. Respondents' Brief in Opposition does not even attempt to address the denial of cross-examination which their position necessarily entails.

With the exception of the split decision in *Brink's Inc.* v. *City of New York*, 717 F.2d 700 (2d Cir. 1983), the cases on which respondents rely do not contain any extended analysis of the propriety of introducing Fifth Amendment claims or the resulting deprivation of cross-examination.[6] Although that case is distinguishable on its facts (*e.g.* the convictions of the Brink's employees of the crimes about which they refused to testify having been previously admitted without objection) the *Brink's* opinions dramatically present the competing points of view on these issues. We urge the Court to consider the carefully reasoned dissent of Judge Winter, in which he concluded that the result reached by the majority was "utterly without precedent in American law" (717 F.2d at 717). Such a diametrically opposed and vigorous expression of views on so vital an issue by such respected jurists underscores the need for review by this Court at the earliest opportunity.

And, aside from *Brink's* and *Carter-Wallace, Inc.* v. *Hartz Mountain Industries, Inc.*, 1983-1 Trade Cas. (CCH) ¶ 65,332

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6 Given the case's special factual setting, it is unclear whether the majority in *Brink's* intended to overrule the Second Circuit's prior holding in *Brenner* v. *World Boxing Council*, *supra*, 675 F.2d at 454 n.7, that no adverse inference may be permitted from a Fifth Amendment invocation by a witness, even an alleged co-conspirator.

(S.D.N.Y. 1983), which simply followed *Brink's*, none of the cases cited by respondents permitted the use of Fifth Amendment invocations by non-party witnesses in a jury trial as evidence of the specific facts asserted in the question posed. Most of respondents' "authorities" involved assertions of the privilege by *parties*.[7] *See, e.g., National Acceptance Co. of America* v. *Bathalter*, 705 F.2d 924 (7th Cir. 1983); *McKinney* v. *Galvin*, 701 F.2d 584 (6th Cir. 1983); *Wehling* v. *Columbia Broadcasting System*; 611 F.2d 1026 (5th Cir. 1980) (per curiam); *SEC* v. *Musella*, 578 F.Supp. 425 (S.D.N.Y. 1984); *see also Compass Insurance Co.* v. *Acella Chrysler-Plymouth, Inc.*, No. 80 Civ. 5608 (HFW) (S.D.N.Y. July 25, 1983), where the court emphasized that *Baxter*[8] applied only to a *party's* refusal to testify but concluded that the sole shareholder of the defendant corporation could not be characterized as a non-party witness. The remaining cases cited by respondents are district court opinions of doubtful validity.[9]

Finally, respondents conclude by asserting (Br. Opp. p. 13) that petitioners could, if they "chose", testify at the trial "through the testimony of the Fifth Amendment witnesses."[10] This argument illustrates the ultimate vice in respondents'

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7 A *party* who invokes the privilege may be able to "explain and control the contours of his invocation", *Lionti* v. *Lloyd's Insurance Co.*, 709 F.2d 237, 246 (3d Cir. 1983) (Stern, J., dissenting) but a party cannot explain or cross-examine an invocation by a non-party witness. Respondents' attempt to equate the ambiguous and unexaminable assertion of the privilege with *testimony* by a non-party employee (Br. Opp. p. 13) is patently spurious.

8 *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

9 *E.g., E.H. Boerth Co.* v. *LAD Properties*, 82 F.R.D. 635 (D. Minn. 1979), permitted an adverse inference against the corporate defendant which employed the invoking witness, while at the same time precluding such an inference against the individual defendant who was the sole owner and general partner of the respective companies (*id.* at 645).

10 The expression "Fifth Amendment witnesses", used repeatedly in Respondents' brief, is reminiscent of the "Fifth Amendment Commie" assumption of probative value (Petition p. 10 n. 9).

position, for it suggests that petitioners can and should force their employees and former employees to waive their privilege and testify. Indeed, respondents condemn petitioners for having "done nothing to encourage testimony by their present and former employees" (Br. Opp. p. 4). Contrary to respondents' suggestion, we submit that it would be highly improper for an employer to attempt to coerce persons who are or have been its employees into giving up their constitutional privilege. Yet the ruling below will foster such coercion (covert or otherwise) if it is permitted to stand.

CONCLUSION

Opinions from the Courts of Appeals for the Second, Third and Fifth Circuits have expressed conflicting views on the merits of the critical question presented for review. No legitimate interest would be served by refusing to resolve this important issue in the context of these cases, where refusal will undoubtedly mean retrials of mammoth proportions. To avoid that result, a writ of certiorari is required now.

Respectfully submitted,

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